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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMODITIES EXPORT CO.
and WALTER H. LUBIENSKI
Petitioners,

V

THE UNITED STATES and
DETROIT INTERNATIONAL BRIDGE COMPANY
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition for Writ of Certiorari

WALTER H. LUBIENSKI
COUNSEL OF RECORD FOR PETITIONERS
23511 Ford Road
Dearborn, Michigan 48128-1260
(313) 563-0888

Of Counsel:

ROGER E. CRAIG
1250 North Tamiami Trail, Ste. 211
Naples, Florida 33940
(941) 434-5454

Dated: June 5, 1996

130PP

Questions Presented

A. May the District Court enter an order approving the Memorandum of Agreement ("MOA") between respondents the United States and the Detroit International Bridge Company without the consent of petitioners (intervenors of right) although the effect of the order would be to put intervenor Commodities out of business and does the preclusion of entry of such an order strip the MOA of legislative authority?

B. Does the proposed taking of petitioners' property under this MOA between respondents the United States and the Detroit International Bridge Company serve a public purpose?

C. Did petitioners/intervenors satisfy the requirements for the issuance of a preliminary injunction as stated in the First Sixth Circuit Mandate?

List of Parties and Statement of Corporate Affiliation under SCR's 14.1(b) and 29.6

All parties to the proceedings are listed in the case caption **EXCEPT DEFENDANTS: Nash P. Sogoian and the Treasurer, City of Detroit.**

Nash P. Sogoian was awarded a $35,000.00 judgment for his condemned land in 1987. Since that time, he has neither participated nor had any further interest in this action.

"It appears that the Treasurer of the City of Detroit is a nominal party, named as a party only because of taxes or tax liens on the subject property." Statement of the US District Court, Detroit, Appendix, *infra*, p A5, n 1.

Petitioner Commodities Export Co. is a Michigan Corporation. It has no parent or subsidiary company.

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Petitioners Commodities Export Co. and Walter H. Lubienski request that a writ of certiorari issue to review the Memorandum Opinion (and Order) (A1) of the United States Court of Appeals for the Sixth Circuit filed on January 23, 1996 affirming the denial by the US District Court in Detroit of petitioners' motion for preliminary injunction and remanding to the District Court for further proceedings.

Opinions and Orders Below

The Memorandum Opinion (and Order) (A1) of the United States Court of Appeals for the Sixth Circuit filed on January 23, 1996 affirming the denial by the US District Court in Detroit of petitioners' motion for preliminary injunction and remanding to the District Court for further proceedings is

unpublished. Petitioners' timely petition for rehearing with *en banc* suggestion was denied in an unpublished Order (A62) of the United States Court of Appeals for the Sixth Circuit filed on March 7, 1996. The Order (A64) staying the mandate until April 19, 1996 of the United States Court of Appeals for the Sixth Circuit filed on April 2, 1996 is unpublished. The Order iss ing the Mandate (A66) of the United States Court of Appeals for the Sixth Circuit filed on April 22, 1996 is unpublished.

The "Opinion and Order Denying Commodities Export Company's and Walter H. Lubienski's Motion to Intervene" (A4) of the US District Court in Detroit (Eastern District, Southern Division, Michigan), dated April 3, 1992, is unpublished.

The Opinion and Order (A15) of the United States Court of Appeals for the Sixth Circuit permitting petitioners to intervene as a matter of right in this action and remanding this case to the District Court to reconsider petitioners' motion for preliminary injunction "in light of our decision granting intervention" (A29) filed on October 12, 1993 is published as *US v Detroit Intern. Bridge Co.*, 7 F3d 497 (CA6 1993). The Detroit International Bridge Company's petition for rehearing was denied in an unpublished Order (A61) of the United States Court of Appeals for the Sixth Circuit filed on November 3, 1993.

The "Opinion and Order Regarding Intervenors' Motion for Preliminary Injunction" (A35) of the US District Court in Detroit (Eastern District, Southern Division, Michigan), dated December 30, 1994 is published as *US v Certain Land Situated in City of Detroit*, 873 F Supp 1050 (ED Mich 1994).

Jurisdiction: Petition for Writ of Certiorari

The unpublished Memorandum Opinion (and Order) (A1)

of the United States Court of Appeals for the Sixth Circuit affirming the denial by the US District Court in Detroit of petitioners' motion for preliminary injunction and remanding to the District Court for further proceedings which is the subject of this petition for writ of certiorari was filed on January 23, 1996. Petitioners' timely petition for rehearing with *en banc* suggestion was denied in an unpublished Order (A62) of the United States Court of Appeals for the Sixth Circuit filed on March 7, 1996. *The United States Court of Appeals for the Sixth Circuit did treat this (A62) as a petition for rehearing.* Under SCR's 13 and 30.1, the 90 days (from March 7, 1996) to file a timely petition for writ of certiorari expires on Wednesday, June 5, 1996. The Supreme Court's jurisdiction is based upon 28 USC 1254(1).

Constitutional Provisions and Statutes Involved

The 5th Amendment to the US Constitution states:

> Criminal actions–Provisions concerning–Due process of law and just compensation clauses.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (Emphasis added.)

The statutes involved (which are quoted verbatim in pertinent part in the District Court's Opinion [A35] of December 30, 1994 in the Appendix) are Public Law 100-202, 101 Stat. 1329-401 to 403 (A43), Public Law 100-440, 102 Stat. 1732-33 (A44), and Public Law 102-393, 106 Stat. 1729, 1751 (A44).

STATEMENT OF THE CASE

A. Statement of the Basis for Federal Jurisdiction pursuant to SCR 14.1(g)(ii)

This is a condemnation action brought by the respondent United States involving lands located in the City of Detroit, Wayne County, Michigan. The United States District Court, Eastern District of Michigan, Southern Division (Detroit), the court of first instance, has subject matter jurisdiction pursuant to 28 USC 1345 (US as plaintiff) and 28 USC 1358 and 28 USC 1403 (eminent domain).

The District Court's interlocutory order (A35) denying petitioners Commodities Export Co.'s and Walter H. Lubienski's motion for preliminary injunction was entered on December 30, 1994. *US v Certain Land Situated in City of Detroit*, 873 F Supp 1050 (ED Mich 1994)(A35). Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Sixth Circuit as to this order ten (10) days later on January 9, 1995. The United States Court of Appeals for the Sixth Circuit has appellate jurisdiction over this case pursuant to 28 USC 41, 28 USC 1292(a)(1), 28 USC 1294(1), 28 USC 2107, FRAP 4(a), and its own prior Mandate (A15) in this action, to wit: prior Mandate (A15) Published As: *US v Detroit Intern Bridge Co*, 7 F3d 497 (CA6 1993).

B. Background

The Ambassador Bridge spans the Detroit River and connects Detroit, Michigan with Windsor, Ontario, Canada. On the American side, Porter Street forms the entrance to this bridge. The Ambassador Bridge is a port of entry into the United States and is manned at all times by US government agencies (Customs, Immigration, etc.) charged with policing the borders of the United States. The Ambassador Bridge is a private toll road owned by respondent Detroit International

Bridge Company ("DIBCO"). DIBCO in turn (through various entities) is owned by the M.J. Moroun family. M.J. Moroun is the Chairman of the Board of DIBCO and the sole owner (100%) of Ammex, Inc., the duty-free store which operates on and adjacent to the Ambassador Bridge. Ammex also operates at the Detroit-Windsor Tunnel, another port of entry, where it has no competitor.

DIBCO also owned the Overland Truck Freight Terminal located just east of the Ambassador Bridge plaza, south of Porter Street. Nash P. Sogoian ("Sogoian") owned land contiguous with this truck terminal.

Petitioner Commodities Export Co. ("Commodities") is a duty-free store which also operates at the Ambassador Bridge. It is Ammex's only competitor in Detroit. Its main store[1], where merchandise is stored and delivered, is a short distance diagonally east of the Ambassador Bridge entrance, north of Porter Street. Commodities' delivery point for duty-free goods is before the border exit point, the so-called "point of no return." This delivery point is protected by a permanent injunction issued in 1977 by the US District Court in Detroit against the US Customs Service ("Customs"). The relationship between Commodities and Customs since this injunction was issued has been hostile. *See Commodities Export Co v US Customs Service*, 888 F2d 431 (CA6 1989); *Commodities Export Co v US Customs Service*, 957 F2d 223 (CA6 1992), *cert den* _____ US _____, 113 S Ct 96, 121 L Ed 2d 56 (1992); *US v Commodities Export Co*, 972 F2d 1266 (Fed Cir 1992), *cert den* _____ US _____, 113 S Ct 1256, 122 L Ed 2d 654 (1993).

Both DIBCO and Customs have a strong vested interest in eliminating Commodities.

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[1]Commodities also has a write-up station on a freeway service drive on the west side of the Ambassador Bridge.

Petitioner Walter H. Lubienski ("Lubienski") is one of the owners of Commodities, its Vice-president and General Counsel, and the owner of the land contiguous with and east of Commodities' main store.

Respondent United States ("the Government") commenced this condemnation action (Case No. 79-CV-73934-DT) in the US District Court in Detroit on October 11, 1979 by suing DIBCO and Sogoian to acquire title to and possession of the Overland Truck Freight Terminal and the adjacent lots thereto owned, respectively, by these two defendants. The purpose was to create a US Customs Cargo Inspection Facility for trucks.

In 1987, Sogoian was awarded $35,000.00 for his land. He has neither participated nor had any further interest in this action since that time.

No final order or judgment has yet been entered as to DIBCO.

C. The Expansion of the US Customs Cargo Inspection Facility and the Memorandum of Agreement between the Government and DIBCO

Customs deemed the Cargo Facility created by this 1979 condemnation action inadequate and from about the mid-1980's there were public notices, meetings, and discussions concerning its expansion. A final Environmental Impact Statement ("EIS") was issued in January, 1989. None of these activities had any impact on the lands or business of petitioners except for a small vacant lot owned by Lubienski which was included in the plan adopted in the EIS.

In the fall of 1990, the Government commenced the condemnations in the US District Court in Detroit to complete this Cargo Facility expansion according to the EIS.

On September 27, 1990, DIBCO with the support of then Mayor of Detroit, Coleman A. Young, proposed the Memorandum of Agreement ("MOA")(A67) to the General Services Administration ("GSA") as the final settlement agreement for this law suit, i.e., the Overland Truck Freight Terminal condemnation suit, Case No. 79-CV-73934-DT, filed in 1979 against DIBCO. The MOA calls for the condemnation (for which DIBCO will pay) of the lands and business of petitioners Commodities and Lubienski as part of the consideration for settling this 1979 action.

DIBCO signed the MOA on March 28, 1991 (A90) and GSA on May 21, 1991 (A91). A press conference was held on May 23, 1991 announcing the agreement. No details were given out, no copies of the MOA furnished, and the fact that the MOA was in settlement of Case No. 79-CV-73934-DT, the Overland Truck Freight Terminal condemnation action, was never disclosed. The meeting of September 27, 1990 and the negotiations leading up to the signing of the MOA by GSA on May 21, 1991 were all secret.

The ostensible purpose of the MOA is to improve traffic flow on the Ambassador Bridge by providing a truck off-ramp leading from the privately owned Ambassador Bridge into the publicly owned US Customs Cargo Inspection Facility. The MOA expands the GSA Site (A68) finalized in the January, 1989 EIS to accommodate this truck off-ramp which will loop through petitioners' lands and business as it enters this expanded US Customs Cargo Inspection Facility.

The key features of the MOA are:

1. At DIBCO's request, the Government is to condemn the lands and business of petitioners Commodities and Lubienski for this truck off-ramp. (A67-A72.)

2. DIBCO shall pay for the condemnation of petitioners' lands and business. (A74-A77.)

3. The Approved Plan must be acceptable to DIBCO. (A70-A72.)

4. DIBCO shall have a cost free right of reverter to the land in the Expanded GSA Site (which includes petitioners' lands and business) except for GSA improvements if the land ceases to be used for any border inspection purposes. (A77-A78.)

5. GSA must consult with DIBCO about the costs of condemnation of the Expanded GSA Site (which includes petitioners' lands and business). (A74-A75.)

6. Commodities will cease to exist. Ammex gains a monopoly in the duty-free industry in Detroit and Customs will no longer be subject to Commodities' injunction.

Petitioners had no knowledge of the MOA prior to December 9, 1991 when they received a copy from GSA as a result of a Freedom of Information Act ("FOIA") request which was made as a result of a chance comment made by Michael Gelber, the GSA project manager, to petitioners in November, 1991. In June, 1991, Gelber told petitioners that no plan was final yet and that GSA would consider alternate plans proposed by petitioners. Petitioners expended time and money submitting five plans to GSA prior to December 9, 1991. All were rejected. GSA never told Commodities that all plans were subject to the approval of DIBCO, its business competitor. Moreover, GSA always gave the impression to petitioners that GSA was behind the condemnation of their lands and business.

Had petitioners known of the MOA which permits its competitor to decide the fate of their lands and business, no plans would have been submitted.

DIBCO has argued that because petitioners submitted these

plans, they knew of the MOA and have already had their hearing on the merits. This is untrue. However, the US District Court in Detroit adopted DIBCO's view. (A50-A52.)

D. Petitioners' Motion to Intervene and Motion for Preliminary Injunction in this Action

On December 30, 1991, petitioners Commodities and Lubienski filed a combined motion to intervene in this action and for a preliminary injunction enjoining the implementation of the MOA.[2]

On April 3, 1992, the District Court in Detroit denied both motions (A4-A14). The District Court excluded any consideration of the MOA and limited the applicability of the FRCivP 24 intervention criteria to the condemnation complaint. Since petitioners had no interest in the Overland Truck Freight Terminal and the Sogoian land which had been condemned by the complaint, petitioners had no right to intervene.

E. The Sixth Circuit in its First Mandate Reversed the District Court, Permitted Intervention of Right, and Remanded

On October 12, 1993, the United States Court of Appeals for the Sixth Circuit reversed the US District Court in Detroit, permitted petitioners Commodities and Lubienski to intervene of right, and remanded (A15-A34).

Based on the MOA, the Sixth Circuit found that petitioners met all the intervention criteria of FRCivP 24 and permitted intervention of right. There are no restrictions or conditions on petitioners' intervention of right.

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[2]The MOA appeared in the District Court file for the first time as an exhibit to petitioners' motions to intervene and for preliminary injunction.

The Sixth Circuit remanded this action to the US District Court in Detroit stating (A29):

> Therefore, we reverse the district court's decision denying the motion for a preliminary injunction and remand for the court *to reconsider this motion in light of our decision granting intervention.* (Emphasis added.)

This First Sixth Circuit Mandate permitted petitioners to challenge the MOA as Chief Judge Merritt stated in his concurring opinion (A34):

> I agree that the district court abused its discretion in ruling that Commodities and Lubienski's motion to intervene was untimely. The suit had progressed to settlement, which was the earliest point at which the applicants could challenge the settlement agreement. Intervention was sought for the legitimate purpose of challenging a settlement agreement which prejudices the interests of the applicants.

The MOA requires the approval of the Attorney General. (A88, A22.) There is none in the record.[3]

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[3]The Government claims that the MOA has been approved by Barry Hartman, an acting AAG, who had delegated authority to settle and compromise lawsuits for amounts up to $2 million, citing 28 USC 516, 518 and 28 CFR 0.160(a). The Government further claims that the MOA entailed a payment of $1.24 million by the Government to DIBCO so that this acting AAG "acted within his delegated authority in approving the MOA."

¶ 8.4 of the MOA (A88) requires approval by the Attorney General - not an acting AAG. ¶ 8.4 is quoted in the Sixth Circuit Mandate (A22). At oral argument before the Sixth Circuit on April 30, 1993, Chief Judge Merritt was skeptical of the Government's claims: *"He's the attorney general? Barry Hartman?* (Emphasis added.)

The Government's claims were completely undercut by DIBCO's

The MOA also requires the approval the US District Court in Detroit. (A67, A22.) Both the Sixth Circuit and the Government acknowledged this fact in the Sixth Circuit's Second Mandate which is the subject of this petition for writ of certiorari (A3):

> At oral argument, counsel for the United States appeared to agree that intervenors will have the opportunity to challenge the settlement agreement when the district court considers whether it should be approved.

To date, neither the Attorney General (i.e., Janet Reno or her predecessor William Barr) nor the US District Court in Detroit has approved the MOA. No final order or final judgment approving the MOA as the final settlement of this action has yet been entered. Moreover, no action condemning petitioners' lands and business has yet been filed.

Because the MOA was and still is merely a *proposed* settlement agreement, the First Sixth Circuit Mandate (A15-A34) gave petitioners the right to challenge the MOA on grounds of necessity and expediency which petitioners would not be able to do *after* the condemnation action for their lands and business was commenced (A24-A25):

> We do not believe the terms of the MOA protects Commodities and Lubienski's interests when it provides for the condemnation of their land, and is subject to being implemented without their input or approval. In fact, Commodities and Lubienski would be unfairly disadvantaged if their land is condemned by the United States before being given the opportunity to assert their interests in this matter. This result would place Commodities and Lubienski at a serious disadvantage, because once a condemnation suit is commenced, they

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statements that several million dollars in excess of $2 million had already been expended pursuant to the MOA.

would have no constitutional right to a hearing on questions relating to necessity and expediency. *See Bragg v. Weaver,* 251 U.S. 57, 58 (1919). Therefore, we hold that the disposition of the condemnation proceedings at issue would impair the ability of Commodities and Lubienski to protect their interest.

The First Sixth Circuit Mandate does not direct the district court to conduct a condemnation hearing limited to issues of legislative authority and public purpose.

F. GSA was advised not to build the truck off-ramp. DIBCO built it anyway and has been operating it successfully since July 1, 1993. GSA reneged on its agreement not to condemn Commodities.

On or about July 9, 1992, *before the truck off-ramp was built,* the US Attorney for the Eastern District of Michigan, Stephen J. Markman, advised GSA that the truck off-ramp should not be constructed. DIBCO went ahead and built the ramp anyway.

During the months of February-March, 1993, there were a series of meetings attended by all parties (Government, DIBCO, Commodities, Lubienski, etc.) with the US Attorney, Mr. Markman, and with GSA's and DIBCO's architects and engineers as well as Commodities' expert.

On March 10, 1993, Mr. Markman issued a letter stating:

> It is our understanding that the General Services Administration has agreed that the current Customs facility expansion project at the Ambassador Bridge will not require the condemnation of Commodities Export Co.. This agreement has been communicated orally by GSA to the Department of Justice. As you know, GSA is still considering whether it will be necessary to take a portion of Commodities' parking lot, which belongs to

Walter Lubienski, in order to complete the truck ramp from the bridge. We are hopeful that the resolution of this issue will be satisfactory to both Commodities Export and GSA.

(See Plat Map at A60: Commodities owns Lots 1 through 5 and Lubienski owns Lots 6 through 10, Wesson and Ingersoll's Subdivision, as recorded In Liber 4, Page 12, of Plats, Wayne County Records. Commodities uses a portion of Lot 6.)

In that series of meetings, GSA's and DIBCO's architects and engineers claimed that the existing configuration of the truck off-ramp was now unsafe, to wit: the "shepherd's hook" loop of the ramp was too acute, the angle of incline was too high, the elevated part of the ramp too long and too high, the ramp exit speed was too high, etc. Safety was the first consideration. These architects and engineers would neither approve nor permit the existing ramp to go into operation because of these alleged safety considerations.

Nevertheless, on July 1, 1993, the existing truck off-ramp went into operation and has been operating successfully ever since including January 19, 1994, the coldest day in recorded Michigan weather history. This existing truck off-ramp is South of Porter Street and has no effect on petitioners' lands or business.

In June, 1993, *after Mr. Markman left office on April 30, 1993,* the Government reneged on its agreement not to condemn Commodities. Customs proposed the current "final" GSA plan (A60): leave only Commodities' building standing with an irregular wedge of land to the East, wall it off, and take the rest of lots 3 through 10 inclusive for the truck off-ramp and a Customs' gun range and parking lot.

G. Remand Proceedings in the US District Court in Detroit pursuant to the Sixth Circuit's First Mandate

The First Sixth Circuit Mandate (A15-A34) directed (A29) the District Court in Detroit *"to reconsider this motion* [petitioners' motion for preliminary injunction] *in light of our decision granting intervention."* (Emphasis added.)

Instead, the District Court treated petitioners as condemnees and not as parties of right. On December 30, 1994, the District Court denied petitioners' motion for preliminary injunction. (A35-A60.)

The whole premise of the District Court's ruling is (A42):

> Although it is undisputed that no actual condemnation of Intervenors' property has yet been sought, because Commodities and Lubienski seek to preclude the "contemplated" condemnation of their property, their proof of "likelihood of success on the merits" for purposes of prevailing at this preliminary injunction phase, necessitates a consideration of whether it is likely that they will succeed once condemnation proceedings are instituted.
>
> All parties - the Government, the Bridge Company and the Intervenors - are in agreement that in condemnation proceedings, the inquiry focuses on the satisfaction of two elements:
>
> (1) Is the project which is the object of condemnation "authorized" by Congress; and
>
> (2) Does the project have a "public purpose"?

See, Berman v. Parker, 348 U.S. 26, 33-35, 75 S.Ct. 98, 102-104, 99 L. Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 240-242, 104 S. Ct. 2321, 2329-2330, 81 L. Ed. 2d 186 (1984); *National Railroad Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992).

In using the Sixth Circuit's preliminary injunction criteria (A29, A41: likelihood of success on the merits, irreparable injury, substantial harm to others, public interest), the District Court limited the applicability of those criteria to its discussion of legislative authority to condemn and public purpose for the condemnation. Except for these two areas, i.e., legislative authority and public purpose, the MOA was totally excluded from consideration.

The District Court's position was that petitioners - even though they were parties of right - had no right to challenge the MOA and that if their motion for preliminary injunction were denied, they were to be dismissed from the case. This was also the position of the Government and DIBCO. At oral argument before the District Court on June 22, 1994, the District Court stated (Tr 38-39):

> And you may say that is the sandbox they want you to play in, but that is the sandbox we are in. Because if I find that Congress has not -- has authorized condemnation for purchase of your property through this action, then the ballgame is over. If they have not authorized it, then these folks are going to have to let you come to the table. It's that simple.

Congress has never stepped into the District Court action. Congress has never usurped the position of the District Court judge and the parties to the action (Government, DIBCO, Commodities, and Lubienski) to either approve or disapprove of the MOA as the final settlement of this action.

As noted *supra*, pp 10-11, to date, petitioners' lands and business have not yet been condemned and neither the Attorney General nor the District Court have yet approved the MOA.

The District Court's finding of legislative authority (A43-A52) devolves upon three appropriations bills, to wit: Public

Law 100-202, 101 Stat. 1329-401 to 403 (A43), Public Law 100-440, 102 Stat. 1732-33 (A44), and Public Law 102-393, 106 Stat. 1729, 1751 (A44) and the Public Buildings Act of 1959 (A47), as amended, 40 USC 601, *et seq*. In either case or combined, the starting point for this legislative authority *or lack thereof* is the MOA because the Government has always represented that it expects DIBCO to pay for the condemnation of petitioners' lands and business *pursuant to the MOA - not the taxpayers*. If the District Court does not enter an order or judgment approving the MOA as the final settlement agreement of this action, the legislative authority relied upon by the District Court and the respondents has no applicability to any condemnation of petitioners' lands and business.

In their combined motion to intervene and for preliminary injunction, which had been before the District Court since December 30, 1991 and the Sixth Circuit since May 29, 1992 (the date the Notice of Appeal was filed), petitioners clearly stated (p 5):

> Intervenors object to this settlement agreement and to any judgment or order being entered in this action which would confirm, approve, or endorse the attached DIBCO-/GSA agreement for the following reasons: . . . .

On remand, petitioners' repeated this objection.

The plan attached (A60) to the District Court's ruling of December 30, 1994 is not the "Approved Plan" required by the MOA. (A70-A72.) Neither the Government nor DIBCO have said that it is. Moreover, DIBCO has specifically denied that it is the "Approved Plan."

There is no "Approved Plan" and, therefore, there is no MOA. The MOA states (A88-A89):

> (8.5.2) In the event the parties cannot agree upon provisions to be included in the Approved Plan, by June

> 30, 1991, it is agreed that the parties will cooperate in good faith with the chairperson of the Urban Planning Department of Michigan State University or his/her designee serving in the capacity of a mediator in an effort to come to an agreement on the Approved Plan. Fees and expenses of the mediator shall be paid equally by GSA and DIBC. *Subject to the above, if GSA and DIBC fail to develop an Approved Plan satisfactory to both parties by January 1, 1992, the terms and conditions of this Agreement yet to be implemented shall be rendered null and void, unless this Agreement is extended by the mutual consent of both parties.* No compensation shall be due by either party to the other, except DIBC's rights stated in paragraph (6.2). (Emphasis added.)

There has been no mediation or extension. Because respondents are continuing to act as if there is an MOA, a preliminary injunction is still necessary.

The District Court's discussion of public purpose (A53-A56) incorrectly merges the privately owned, private profit-making toll road, i.e., the Ambassador Bridge, with the US Customs Cargo Inspection Facility itself. The District Court assumes that the Ambassador Bridge is a public owned bridge which constitutes a public road. It is not.

Moreover, none of the authority cited by the District Court supports the contention that the Government may make a private agreement with one competitor to condemn its only other competitor.

The District Court erroneously states (A58):

> As indicated above in this Opinion and Order [A41], however, the Government has represented that it only intends to condemn, in fee, a small portion of Commodities Export's parking lot and take an easement over the parking lot for ingress and egress to adjoining property.

> It is *not* going to put Commodities out-of-business so as to create a "duty-free monopoly". (Emphasis in original.)

During the District Court remand proceedings and before the Court issued this ruling, petitioners filed an Affidavit flatly denying this contention. The Government intends to condemn all of Lubienski's lands and a substantial portion of Commodities' parking lot. See plan at A60. As the plan shows, Commodities would lose virtually all access to Porter Street and be forced to do business out of its rear alley. This would completely disrupt and frustrate the parking lot's operation. The taking of that portion of Commodities' parking lot, a business totally dependent on motor vehicle trade, would destroy the parking lot and, therefore, the business. Finally, no one is going to patronize a store whose front door is but a few feet from a truck off-ramp operating 24hrs./day accommodating the largest tractor-trailers where the noise and pollution levels will be extremely high.

H. The Sixth Circuit's Second Mandate Affirmed the ruling of the District Court and Remanded

On January 23, 1996, the Sixth Circuit filed its Second Mandate (A1-A3) in this action in an unpublished Memorandum Opinion. This mandate (A1-A3) is the subject of this petition for writ of certiorari. This mandate (A1-A3) affirmed the District Court's denial (A35-A60) of petitioners' motion for preliminary injunction and remanded this action to the District Court. In pertinent part this Second Sixth Circuit Mandate stated (A3):

> Contrary to intervenors' assertions, the panel did not decide anything related to the merits of their cause, and their entitlement to intervention was the only "law of the case" at that point. The only issue before us on this appeal is whether the district court erred in denying the preliminary injunction, and we decide that issue adversely to intervenors.

> At oral argument, counsel for the United States appeared to agree that intervenors will have the opportunity to challenge the settlement agreement when the district court considers whether it should be approved. That challenge could include what appears to be intervenors' argument that the settlement agreement rests upon the taking of their land, and that such a taking, even with compensation, would be invalid because it was the product of improper collusion between the parties to the agreement.[1]
>
> The order denying the preliminary injunction is **affirmed**, and this cause is remanded to the district court for further proceedings according to law and consistent with this opinion.
>
> [Footnote 1]: The district court noted, in discussing intervenors' failure to carry their preliminary injunction burden of showing they would likely succeed on the merits of their cause, that intervenors had "come forward with no hard evidence to substantiate their wholly speculative allegations." 873 F. Supp. at 1059 n. 10. Failure to present that evidence in support of their request for a preliminary injunction does not amount to a waiver of intervenors' collusion argument at a later stage in the litigation.

A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 7, 1996 (A62). This petition was treated as a petition for rehearing by the Sixth Circuit.

ARGUMENT

A. If the District Court in Detroit does not enter an order or judgment approving the MOA as the final settlement agreement in this action, all the legislative authority relied upon by the District Court and the

Sixth Circuit is inapplicable to the proposed condemnation of petitioners' lands and business. A judgment or order which puts petitioners out of business may not be entered without petitioners' consent. *Local Number 93, International Assoc. of Firefighters, etc. v Cleveland*, 478 US 501, 92 L Ed 2d 405, 106 S Ct 3063 (1986).

The Government has always represented that it expects DIBCO to pay for the condemnation of petitioners' lands and business *pursuant to the MOA - not the taxpayers*. If the District Court does not enter an order or judgment approving the MOA as the final settlement agreement of this action, the legislative authority relied upon by the District Court, the Sixth Circuit, and the respondents has no applicability to any condemnation of petitioners' lands and business.

The MOA is the starting point and foundation of that legislative authority, to wit: Public Law 100-202, 101 Stat. 1329-401 to 403 (A43), Public Law 100-440, 102 Stat. 1732-33 (A44), and Public Law 102-393, 106 Stat. 1729, 1751 (A44) and the Public Buildings Act of 1959 (A47), as amended, 40 USC 601, *et seq*.

The Government has authority to *accept* money from DIBCO to expend on this project pursuant to the MOA under Public Law 102-393, 106 Stat. 1729, 1751 (A44).[4] It has no authority to expend *US Treasury funds*. 40 USC 606(a) states in pertinent part:

---

[4]This legislation was necessary because GSA would otherwise be accepting funds from DIBCO under the MOA as a "gift" under 40 USC 298a and then withdrawing it illegally for use and exchange for other amounts, etc. in violation of 31 USC 3302(a).

In its May 3, 1995 Brief to the Sixth Circuit, the Government stated (p 6, n 5): "GSA has received congressional authorization to accept funds from DIBCO under the MOA and apply those funds to this project...."

> (a) Limitation of funds; transmission to Congress of prospectus of proposed project. In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4 [40 USC 603, expenditure estimated at less than $1.5 million], no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $1,500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives. . . .

As noted *supra*, p 10, n 3, DIBCO has stated that expenditures under the MOA have already exceeded several million dollars over $2 million.

There is nothing in the record of this action which either suggests or implies that Congress has stepped into the judicial arena (i.e., into the District Court action), usurped the authority of the District Court and the parties, and has itself approved the MOA as the final settlement of this action so that no court order, judgment, or decree is required and so all that is left is for the Government to go forward and condemn the petitioners' lands and business. Nor has Congress directed the District Court to approve the MOA as the final settlement of this action.

Petitioners do not consent to an order or judgment which approves the MOA as the final settlement of this action and, thereby, puts Commodities out of business.

In *Local Number 93, International Assoc. of Firefighters, etc. v Cleveland*, 478 US 501, 528-30; 92 L Ed 2d 405; 106 S Ct 3063 (1986), the Supreme Court stated:

Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that because the Union was permitted to intervene as of right, its consent was required before the court could approve a consent decree. This argument misconceives the Union's rights in the litigation.

A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party--whether an original party, a party that was joined later, or an intervenor--could preclude other parties from settling their own disputes and thereby withdrawing from litigation. *Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.* [Emphasis added.] See *Zipes v Trans World Airlines, Inc.*, 455 US 385, 392, 400, 71 L Ed 2d 234, 102 S Ct 1127 (1982); *Kirkland v New York State Dept. of Correctional Services*, 711 F2d 1117, 1126 (CA2 1983), cert denied, 465 US 1005, 79 L Ed 2d 230, 104 S Ct 997 (1984). *Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that [it] was due ...."* [Emphasis added.] *Zipes, supra*, at 400, 71 L Ed 2d 234, 102 S Ct 1127.

Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agree-

ment. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. [Emphasis added.] 3B Moore ¶ 24.16[6], p 181; see also, *United States Steel Corp. v EPA*, 614 F2d 843, 845-846 (CA3 1979); *Wheeler v American Home Products Corp.*, 563 F2d 1233, 1237-1238 (CA5 1977). *And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.* [Emphasis added.] See, e.g., *United States v Ward Baking Co.*, 376 US 327, 11 L Ed 2d 743, 84 S Ct 763 (1964); *Hughes v United States*, 342 US 353, 96 L Ed 394, 72 S Ct 306 (1952); *Ashley v City of Jackson*, 464 US, at 902, 78 L Ed 2d 244, 104 S Ct 255 (Rehnquist, J., dissenting from denial of certiorari); 1B Moore ¶ 0.409[5], p 326, n 2. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. See *United States v Armour & Co.*, 402 US, at 676-677, 29 L Ed 2d 256, 91 S Ct 1752. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, see *Wygant v Jackson Board of Education*, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986), under § 703 of Title VII, see *McDonald v Santa Fe Trail Transp. Co.*, 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574 (1976); *Steelworkers v Weber*, 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721 (1979), or as a matter of contract, see *W. R. Grace & Co. v Rubber Workers*, 461 US 757, 76 L Ed 2d 298, 103 S Ct 2177 (1983). Indeed, despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims. Whether it is now too late to raise such claims, or--if not--whether the Union's claims have merit are questions that must be presented in the first instance to the District Court, which has retained

> jurisdiction to hear such challenges. The only issue before us is whether § 706(g) barred the District Court from approving this consent decree. We hold that it did not. Therefore, the judgment of the Court of Appeals is affirmed.

If in *Local Number 93* the consent decree had called for the elimination of the non-minority firefighters union, that union, as an intervenor of right, could have blocked the entry of the consent decree by withholding its consent under the Supreme Court's foregoing opinion.

In this action, the MOA calls for the elimination of Commodities. Under the Supreme Court's opinion in *Local Number 93*, petitioners have a right to block the entry of a decree approving the MOA as the final settlement of this action by withholding their consent. Furthermore, Commodities was never given the opportunity *"to air its objections to the reasonableness . . . and to introduce relevant evidence."* There is no authority which holds that as to a proposed settlement agreement, for which the District Court has not yet entered an order or judgment approving it, that a party of right is barred from raising objections based on necessity, expediency, and fairness. Petitioners have had no hearing on the necessity, expediency, or fairness of the MOA. The First Sixth Circuit Mandate issued on October 12, 1993 (A15-A34) entitled them to that. At oral argument before the Sixth Circuit on April 30, 1994, Chief Judge Merritt stated (6Tr 49-50):

> Well, as a matter on that point, as a matter of legal process, of course, you can argue many things if you are permitted to intervene, one of which could be that to Judge Rosen or to the district judge, "Judge, we think that this final entry of judgment with a stipulation and settlement agreement is not proper unless it provides that any agreement growing out of this settlement of this litigation, further agreement, is brought back to you for

> the approval of the Court to determine that it's *fair to all of the parties including the intervenors* before such agreement is executed under a preliminary agreement that calls for the Court to enforce it at the party's request."
>
> You could simply ask that the Court make sure that any further agreement be brought back to the Court for a review as to its *fairness*, right? (Emphasis added.)

"[T]he District Court [has never] *carefully considered these* [petitioners'] *objections and explained why it was rejecting them."* The MOA has placed the heavy obligation of self-preservation upon petitioners and none of petitioners' claims have yet been litigated.

If this action had been tried according to the complaint, DIBCO would have been awarded a sum of money as just compensation for the taking of its Overland Truck Freight Terminal and no more. DIBCO would not have gained the elimination of a competitor and a self-serving truck off-ramp for its private bridge. In this regard the comment of Justice Rehnquist in his dissent in *Local Number 93* is helpful (478 US 538):

> The two prior cases principally relied upon by the Court are *Pacific R. Co. v Ketchum*, 101 US 289, 25 L Ed 932 (1880), and *Swift & Co. v United States*, 276 US 311, 72 L Ed 587, 48 S Ct 311 (1928). No language from either of these cases is quoted to explain their citation for the proposition that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Ante, at 525, 92 L Ed 2d, at 425.

B. The proposed condemnations of petitioners' lands and business under the MOA lacks public purpose. The elimination of a competitor to create a monopoly is

not a public purpose. The extension of a private toll road into a public facility to improve traffic flow on that private road and thereby generate more revenue for its owners is not a public purpose.

The proposed condemnation of petitioners' lands and business under the MOA will put petitioner Commodities out of business. Petitioners stated this unequivocally to both the District Court in Detroit in an Affidavit before the District Court entered its ruling (A35-A60) denying petitioners' motion for preliminary injunction on December 30, 1994 and to the Sixth Circuit. The end result is a monopoly for Moroun's Ammex duty-free stores in Detroit. This is not a public purpose.

Michigan Statutes Annotated (MSA) 9.1171, Michigan Compiled Laws (MCL) 254.1 states:

> Bridges and culverts; construction, improvement and repair; part of road.
>
> Sec. 1.
>
> *Bridges and culverts shall be considered in all respects as a part of the road upon which they are, or are proposed to be located.* The construction, improvement, repair and maintenance thereof, including adequate approaches and the doing of any act or the performance of any work necessary for the protection thereof, and also including the maintenance and operation of movable span bridges, shall be considered in all respects except as hereinafter otherwise provided, the same as the construction, improving and maintaining of the road upon which any such bridge or culvert is situated, and, except as hereinafter otherwise provided, shall be paid for accordingly. (Emphasis added.)

This statute does not apply to the Ambassador Bridge.

MSA 9.1202, MCL 254.32 states:

> Bridges excepted.
>
> Sec. 32.
>
> *The provisions of this act shall not apply to any bridge across any river forming the boundary between this state and any foreign country.* (Emphasis added.)

The Ambassador Bridge is privately owned and operated for profit by DIBCO. (A25-A26.) It is a *private* toll road constituting a border crossing point over the Detroit River between Detroit, Michigan, and Windsor, Ontario, Canada. (A18-A19.) DIBCO pays local real estate and personal property taxes on the Ambassador Bridge, enjoys no governmental immunity from suit, and must insure itself against liability. The fact that DIBCO's customers must undergo inspection upon entering the United States (i.e., they must comply with all applicable statutes and regulations of various US Government agencies such as Customs, INS, etc.) is the normal concomitant of operating a *private* international toll bridge for profit. It does not imbue that activity with a public purpose.

The fact that DIBCO wishes to extend its *private* toll road via a truck off-ramp into the US Customs Cargo Inspection Facility so that its paying customers can be processed faster by Customs, INS, etc. and so that DIBCO can make more money by being able to handle more paying customers on its *private* toll road is not a public purpose.

All of the lower court's statements concerning public purpose incorrectly assume that the Ambassador Bridge is a public road on a public bridge rather than the reality that it is a *private* road on a *private* bridge. (A53-A56.) The revenue derived from the operation of the Ambassador Bridge goes into the Moroun family private coffers - not to any

public treasury.

Without public purpose, the taking of petitioners' lands and business violates the 5th Amendment.

C. When the MOA is stripped of either legislative authority or public purpose as demonstrated in the preceding arguments, petitioners meet the Sixth Circuit preliminary injunction criteria (A29, A41: likelihood of success on the merits, irreparable injury, substantial harm to others, public interest) and the preliminary injunction enjoining any further implementation of the MOA as it impacts petitioners should issue without bond as a public question is involved.

CONCLUSION

Wherefore, petitioners Commodities Export Co. and Walter H. Lubienski pray that this Court grant their petition for writ of certiorari and REVERSE the Sixth Circuit and the District Court and ORDER the District Court to issue the preliminary injunction as prayed.

Dated: June 5, 1996

WALTER H. LUBIENSKI
COUNSEL OF RECORD FOR PETITIONERS
23511 Ford Road
Dearborn, Michigan 48128-1260
(313) 563-0888

Of Counsel:

ROGER E. CRAIG
1250 North Tamiami Trail, Ste. 211
Naples, Florida 33940
(941) 434-5454

APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 95-1118

UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V

CERTAIN LAND SITUATED IN THE CITY
OF DETROIT, WAYNE COUNTY, MICHIGAN;
NASH P. SOGOIAN;
AND TREASURER, CITY OF DETROIT,
Defendants,

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

COMMODITIES EXPORT COMPANY,
a Michigan Corporation;
WALTER H. LUBIENSKI,
Intervenors-Appellants.

Filed: January 23, 1996
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MEMORANDUM OPINION

BEFORE: KRUPANSKY, BOGGS, and NORRIS, Circuit Judges

PER CURIAM. In October 1993, a panel of this court reversed a decision of the district court that denied to Commodities Export Company and Walter H. Lubienski permission to intervene in this condemnation action. *See United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497 (6th Cir. 1993). Commodities and Lubienski sought to intervene and to obtain a preliminary injunction to prevent implementation of a settlement agreement between the United States and the Detroit International Bridge Company that was pending before the district court. Because the district court denied intervention, it also summarily denied the request for a preliminary injunction.

Because this court concluded that the district court should have permitted Commodities and Lubienski to intervene, their request for a preliminary injunction was remanded to the district court for a determination of the merits of that request. Upon remand, the district court denied the preliminary injunction sought by intervenors.

Having had the benefit of oral argument, and having carefully reviewed the record and the briefs of the parties, we agree with the district court's conclusion that intervenors are not entitled to a preliminary injunction and affirm the district court's order for the reasons stated by that court in its opinion dated December 30, 1994. *See United States v. Certain Land Situated in the City of Detroit*, 873 F. Supp. 1050 (E. D.

Mich. 1994).

As the result of our holding, this cause will, of course, return to the district court for further proceedings. The prior panel of this court determined that intervenors had the right to intervene, and so returned the case to the district court to consider their request for a preliminary injunction. Contrary to intervenors' assertions, the panel did not decide anything related to the merits of their cause, and their entitlement to intervention was the only "law of the case" at that point. The only issue before us on this appeal is whether the district court erred in denying the preliminary injunction, and we decide that issue adversely to intervenors.

At oral argument, counsel for the United States appeared to agree that intervenors will have the opportunity to challenge the settlement agreement when the district court considers whether it should be approved. That challenge could include what appears to be intervenors' argument that the settlement agreement rests upon the taking of their land, and that such a taking, even with compensation, would be invalid because it was the product of improper collusion between the parties to the agreement.[1]

The order denying the preliminary injunction is **affirmed**, and this cause is remanded to the district court for further proceedings according to law and consistent with this opinion.

---

[1]The district court noted, in discussing intervenors' failure to carry their preliminary injunction burden of showing they would likely succeed on the merits of their cause, that intervenors had "come forward with no hard evidence to substantiate their wholly speculative allegations." 873 F. Supp. at 1059 n. 10. Failure to present that evidence in support of their request for a preliminary injunction does not amount to a waiver of intervenors' collusion argument at a later stage in the litigation.

No. 79-CV-73934-DT

Unites States District Court
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA

Plaintiff,

V

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN; DETROIT INTERNATIONAL BRIDGE COMPANY; NASH P. SOGOIAN; AND TREASURER, CITY OF DETROIT,

Defendants,

April 3, 1992

OPINION AND ORDER DENYING COMMODITIES EXPORT COMPANY'S AND WALTER H. LUBIENSKI'S MOTION TO INTERVENE

I. INTRODUCTION

The above-captioned condemnation proceeding, which was instituted in 1979, was recently brought before the Court for the limited purpose of deciding the Motion of Defendant Nash P. Sogoian to set aside the Judgment entered by the Court in 1987 awarding Sogoian $35,000 for the Government's condemnation of a small parcel of land adjacent to the Detroit/Windsor Ambassador Bridge in Detroit, Michigan. From the Court's review of the file of this matter, it appears that the case has not yet been settled between the Govern-

ment and Defendant Detroit International Bridge Company ("DIBC").[1] DIBC is the owner of two parcels of land at issue in this condemnation proceeding. Segoian was the owner of the third parcel.

Commodities Export Company ("Commodities") operates a "duty free" shop on the U.S. side of the Ambassador Bridge, in Detroit. Walter H. Lubienski ("Lubienski") is the owner of another parcel of land near the Ambassador Bridge which is the subject of a separate and currently on-going condemnation proceeding, United States of America v. 0.03788 Acres of Land, More or Less, Situated in the City of Detroit, Wayne, County Michigan, No. 90-CV-73416-DT, which is assigned to Judge Lawrence Zatkoff. Lubienski is also the attorney of record who has been representing Commodities in an on-going dispute since 1976 involving Commodities "duty free" shop and U.S. Customs tariffs and assessments against it. See, Commodities Export Co. v. United States Customs Service, _ F.2d_, 1992 U.S. App. LEXIS 2095 (6th Cir. 1992); United States v. Commodities Export Co., 755 F. Supp. 418 (CIT 1991); Commodities Export Co. v. United States Customs Service, 1990 U.S. Dist. LEXIS 19566 (E.D. Mich. 1990); United States v. Commodities Export Co., 733 F. Supp. 109 (CIT 1990);In re Commodities Export Co., 914 F.2d 270 (Fed. Cir. 1990); Commodities Export Co. v. United States Customs Service, 888 F.2d 431 (6th Cir. 1989); Commodities Export Co. v. United States Customs Service, 1988 U.S. Dist. LEXIS 17744 (E.D. Mich. 1988).

Commodities and Lubienski seek to intervene in the instant matter involving only the validity of the monetary Judgment awarded to Defendant Segoian because they claim that a proposed settlement agreement between the Government and

---

[1]It appears that the Treasurer of the City of Detroit is a nominal party, named as a party only because of taxes or tax liens on the subject property.

DIBC -- which has yet to be approved by the Attorney General -- pertains not only to the condemned Segoian parcel and the two DIBC parcels (which were the subject of the instant condemnation proceeding), but also the Lubienski property (which is the subject of the condemnation proceeding before Judge Zatkoff), and a third piece of property which abuts the Lubienski parcel. All three of these properties have been, or are in the process of being, condemned by the Government for expansion of U.S. Customs inspection facilities at the Ambassador Bridge.

Commodities and Lubienski argue that the proposed agreement between the Government and the DIBC "creates a rigged condemnation". They contend that "the Government and DIBCO are hostile to Commodities and Lubienski" and, therefore, "interests will not only be ignored but also deliberately prejudiced by the existing parties " in the instant condemnation proceeding. [Intervenor's Brief, pp. 4-5.] Therefore, they seek to intervene in this proceeding, pursuant to Fed. R. Civ. Pro. 24, to enjoin the Government and DIBC from implementing the yet-to-be-approved agreement.

For the reasons stated in this Opinion and Order, the Court finds that Commodities and Lubienski are not entitled to intervention in this action either as of right or permissively.

II. DISCUSSION

The right to intervene in an on-going action is governed by Fed. R. Civ. Pro. 24, which provides, in pertinent part:

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so

> situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of rights of the original parties.

In determining whether or not to permit intervention in an existing action, the court must focus on the relevant scope of the proceeding in which the applicant seeks to intervene. Wade v. Goldschmidt, 673 F.2d 182 (7th Cir. 1982). As the Wade court explained:

> Our review of an intervention order does not involve an examination of the theoretical interests of proposed intervenors that would justify the initiation or defense of a lawsuit in appropriate circumstances. In the context of intervention, the question is not whether a lawsuit should be begun [or defended], but whether already initiated litigation should be extended to include additional parties.

Id. at 184, citing, Smuck v. Hopson, 408 F.2d 175, 179 (D.C. Cir. 1969).

The instant action is a condemnation proceeding pertaining to three specific parcels of land -- one owned by Defendant Segoian and two owned by DIBC. Federal courts have universally held that condemnation proceedings are limited in scope. As explained by the Seventh Circuit in United States v. 36.96 Acres of Land in LaPorte, Indiana, 754 F.2d 855

(7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986),

> An eminent domain proceeding such as this action considers only two legal interests. The first interest is that of the sovereign to exercise the poser [*sic:* power] of eminent domain, which is essential to a sovereign government, and exercisable only by the legislature or as conferred by congressional enactment. The second interest in an eminent domain proceeding is one of private ownership -- essentially the ownership of the condemned property.

754 F.2d at 858 (citations omitted and emphasis added).

With respect to this second interest -- i.e., the ownership of the condemned property, as the court in United States v. 9.94 Acres of Land in the City of Charleston, 51 F. Supp. 478 (E.D. S.C. 1943), explained, the issue for judicial determination is the value of the property taken:

> The legislature and the executive offices determine what they want and are empowered to take it, but the court determines what is the value of what they have taken and what is the just compensation to be paid to the owners.

Id. at 481. See also, Phillips v. United States, 243 F.2d 1, 2 (9th Cir. 1957) (Condemnation actions are "not concerned with the taking of rights of different persons, but with the seizure of the property itself." Id.)

Intervention as of Right

As indicated above, pursuant to Fed. R. Civ. Pro. 24(a), an individual or an entity is entitled to intervene in an action as of right when a statute confers an unconditional right to intervene. Commodities and Lubienski do not allege that any federal statute provides them with such an unconditional right, nor has the Court independently found any such statute.

Thus, if these proposed intervenors are entitled to intervention as of right, they must come within the provisions of Rule 24(a)(2).

To be entitled to intervention as of right under Rule 24(a)(2), four requirements must be met. The proposed intervenor must show:

1) an interest related to the property or transaction which is the subject of the action;

2) that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect that interest;

3) that the intervenor's interest is not adequately represented by existing parties; and

4) that their application to intervene is timely.

United States v. 36.96 Acres of Land, supra. The proposed intervenor must satisfy each requirement before a court will grant a motion to intervene. Id. at 858, citing, CFTC v. Heritage Capital Advisory Services, Ltd., 736 F.2d 384, 386 (7th Cir. 1984). If the proposed intervenor fails to meet any one of these four requirements, then it cannot intervene as of right. Bush v. Viterna, 740 F.2d 350, 354 (5th Cir. 1984).

With respect to the first requirement -- the intervenor's interest in the property or transaction at issue -- a proposed intervenor must show "a direct, significant legally protectable interest in the property or transaction subject to the action" in which intervention is sought. Donaldson v. United States, 400 U.S. 517, 531 (1971). "Theoretical interests" do not satisfy this requirement. Wade v. Goldschmidt, supra. Nor is it enough that the proposed intervenor's interest is "arguably within the zone of interests" at issue in the action. United States v. 36.96 Acres of Land, supra, 754 F.2d at 859.

By application of the foregoing standards, the court in United States v. 36.96 Acres of Land, supra, held that because the proposed intervenors did not claim any ownership interest in the property which was the subject of that condemnation proceeding, the district court did not abuse its discretion in denying their motion to intervene under Fed. R. Civ. Pro. 24(a).

Similar results have been reached by other federal courts. See e.g., New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452 (5th Cir. 1984), cert. denied, 469 U.S. 1019 (1984) (economic interest in the outcome of litigation was not a legally protectable interest under Rule 24(a) so as to entitle the city of New Orleans to intervene in the lawsuit because the city was not a party to the agreement at issue nor a third-party beneficiary); Dodson v. Salvitti, 77 F.R.D. 674 (E.D. Pa. 1977) (economic loss that would result from the construction of low income housing on property adjacent to the proposed intervenors' property held not to be an interest sufficiently related to the property which was the subject of the action); Wade v. Goldschmidt, supra (intervention denied to proposed intervenors who were not owners of property directly impacted by the construction of an expressway; only the plaintiffs' property, on which the expressway was to be constructed had such a direct interest).

See also, Bachman v. Hecht, 659 F. Supp. 308 (D.V.I. 1986), aff'd, 849 F.2d 599 (3rd Cir. 1988). In that case, the proposed intervenors, who were owners in a development, sought to intervene in an action pertaining to a dispute over another plot in the development. They claimed that the settlement agreement entered into between the parties to that dispute would impair their rights. The court denied the motion to intervene because the proposed intervenors had no interest in the plot at issue in the dispute. With respect to the claim of the proposed intervenors of a requisite "interest", the court stated, "[W]hile a landowner may be concerned about the goings on in an abutting property, such concerns do not

rise to the level of a legal interest requiring the court to allow intervention as a right." Id. at 312.

Based on the foregoing, it is clear that Commodities and Lubienski do not have such a "direct, legally protectable interest" in the Segoian/DIBC property which is at issue in the instant action to entitle them to intervention as of right.

Not having satisfied the first requirement for intervention as of right, it is unnecessary for the Court to address the other three Rule 24 (a)(2) requirements. However, the Court would note that to the extent that the proposed intervenors contend that their "interests" might be impaired by the disposition of these condemnation proceedings, Commodities has not demonstrated how the condemnation of the subject property would impair its interest in its duty free shop -- other than to subjectively argue as it has in all of its other litigation that DIBC (which owns the Ammex duty free shop at the Detroit/Windsor Tunnel, which is Commodities' competitor with respect to "duty free" goods) is "engaged in a conspiracy to put Commodities' duty free shop out of business" -- and Lubienski already has a forum to contest the condemnation of its property by virtue of the on-going condemnation suit pending before Judge Zatkoff.

Further, even if the Court were to find that the "proposed settlement agreement" entered into between the Government and DIBC with respect to this litigation -- which has not yet been implemented -- the Court notes that the terms of that proposed settlement agreement themselves adequately protect Commodities and Lubienski's interests.

Section 8.5.1 of that proposed agreement expressly provides:

> In the event [that] prior to any expenditure of funds by DIBC, or the granting of any easements, licenses, rights of way or other interests in property. . . GSA and DIBC

are unable to comply with the terms of this Agreement due to the actions of any third-party which realistically prohibit GSA or DIBC from proceeding with this Agreement, all said terms and conditions shall be rendered null and void.

Section 8.5.3 of the proposed agreement further provides:

After the development of an Approved Plan and the expenditure of any funds by DIBC or the granting of any easements, licenses, rights-of-way or other interests in property . . . the terms and conditions of this Agreement shall remain in full force and effect except to the extent that compliance with those terms and conditions is frustrated by an order from a court of competent jurisdiction, . . . [or] the action or inaction of a legislative body of competent jurisdiction . . . .

With respect to the timeliness of proposed intervenors' motion, Commodities and Lubienski contend that their motion is timely because they only found out about the terms of the proposed agreement in late December 1991. The proposed agreement, however, is dated March 28, 1991. The Court notes that the Lubienski property condemnation action, which is currently pending before Judge Zatkoff, was filed in November of 1990. Lubienski claims that he served the Government with a document production request on March 29, 1991 that would encompass this document but that the Government produced no documents, objecting to the request on the grounds of relevancy. Although Lubienski claims that he filed a motion to compel discovery in his condemnation proceeding (which apparently is still awaiting the court's resolution), however, there is no indication when such a motion to compel was filed. In short, this Court is not satisfied that the proposed intervenors have established that they had no way of learning of the proposed agreement before December 1991 so as to render the instant December 30, 1991 motion to intervene timely.

For all of these reasons, the Court finds no basis for Commodities' and Lubienski's intervention as of right.

Permissive intervention

Commodities and Lubienski alternatively request that the Court allow it to intervene permissively under Fed. R. Civ. Pro. 24(b). As indicated above, permissive intervention is allowed where a statute confers a conditional right to intervene. Proposed intervenors do not allege any such statute. Alternatively, permissive intervention may be allowed when there is a common question of law or fact and intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. Pro. 24(b).

Permissive intervention is wholly discretionary with the district court. United States v. 36.96 Acres of Land, supra, 754 F.2d at 860. This is so even if there is a common question of law or fact or the requirements of Rule 24(b) are otherwise satisfied. Bush v. Viterna, supra, 740 F.2d at 359.

When addressing the question of permissive intervention, courts routinely focus on the issue of undue delay and prejudice to the rights of the actual parties. See, United States v. 36.96 Acres of Land, supra (permissive intervention denied "in order to avoid the likelihood of undue delay and prejudice to the rights of the original parties" and to "avoid prolonging an already lengthy and tired lawsuit". 754 F.2d at 860); Bachman v. Hecht, supra, ("The parties having negotiated and signed a complex settlement over a year ago, would be significantly prejudiced by intervention of additional parties to disrupt that settlement at this late date." 659 F. Supp. at 313). See also, Media General Cable, Inc. v. Sequoyah Condominium Council, 721 F. Supp. 775 (E.D. Va. 1989); Rollins Cablevue, Inc. v. Saienni Enterprises, 115 F.R.D. 484, 489 (D. Del. 1986).

This condemnation proceeding has been pending with

respect to DIBC for over 12 years. According to the Government and DIBC, the reason for this length of time is the complex and detailed settlement negotiations which culminated in the March 1991 proposed settlement agreement. That proposed agreement is now awaiting approval of the Justice Department.

Based on the foregoing, the Court finds that to allow intervention of these proposed intervenors at this stage of the proceedings would negate the years of efforts of the parties to reach a settlement.

Moreover, as indicated above, Commodities does not have an ownership interest in any of the properties which are the subject of the proposed settlement agreement, thus, with respect to this proposed intervenor, the Court does not find any "common issue of law or fact" is involved to bring Commodities within the purview of Rule 24(b). And, with respect to Lubienski, as noted above, this proposed intervenor has an avenue to pursue his claims by virtue of the condemnation proceeding pending before Judge Zatkoff.

III. CONCLUSION

For all of the foregoing reasons, and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that the Motion of Commodities Export Company and Walter H. Lubienski to Intervene in the above-captioned action be, and hereby is, DENIED. Accordingly,

IT IS FURTHER ORDERED that the proposed intervenors' motion for preliminary injunctive relief is also DENIED.

Gerald E. Rosen
United States District Judge

7 F3d 497 (CA6 1993)

No. 92-1687

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

Walter H. Lubienski and Commodities
Export Company, Proposed
Intervenors-Appellants.

Argued April 30, 1993

Decided October 12, 1993

Rehearing Denied November 3, 1993

Landowner and company moved to intervene in condemnation proceeding brought by United States against third party. The United States District Court for the Eastern District of Michigan, Gerald E. Rosen, J,, denied motion. Landowner and company appealed. The Court of Appeals, Keith, Circuit Judge, held that: (1) landowner and company had direct, legally protectible interest in property which was subject of proceeding; (2) disposition of proceedings would impair ability of landowner and company to protect their interest; (3) interests of landowner and company were not adequately represented by existing parties in proceedings; and (4) motion

was timely.

Reversed and remanded.

Merritt, Chief Judge, concurred and filed opinion.

1. Federal Civil Procedure Key # 341

Landowner and company had direct, legally protectible interest in property which was subject of condemnation proceeding brought by United States against third party, for purposes of determining whether landowner and company were entitled to intervene in proceeding; settlement between United States and third party was designed to operate as final judgment regarding condemnation proceedings, and agreement provided for condemnation of property of landowner and company.

2. Federal Civil Procedure Key # 341

Disposition of condemnation proceedings brought by United States against third party would impair ability of landowner and company to protect their interest, for purposes of determining whether landowner and company were entitled to intervene in proceeding; terms of settlement between United States and third party could not protect interests of landowner and company when it provided for condemnation of their land, and if their land was condemned before they were allowed to intervene, they would have no constitutional right to hearing on questions relating to necessity and expediency.

3. Federal Civil Procedure Key # 341

Interests of landowner and company were not adequately represented by existing parties in condemnation proceedings brought by United States against third party, for purposes of

determining whether landowner and company were entitled to intervene in proceeding; landowner and company alleged that same family which owned third party owned store which was in direct competition with company and that company had rebuffed offers to sell out from representatives of family.

4. Federal Civil Procedure Key # 320

Motion by landowner and company to intervene in condemnation proceedings brought by United States against third party was timely, even though it was made over seven months after settlement agreement between United States and third party in which landowner and company had legally protectible interest was executed; landowner and company conceded that before they filed motion they were aware of speculation about agreement but they were unaware of actual terms of agreement, and they stated that United States told them in negotiations that no plan was final yet.

Katherine L. Adams (argued and briefed), U.S. Dept. of Justice Environment & Natural Resources, Donald F. Rosendorf, U.S. Dept. of Justice Land & Natural Resources, Div., Washington, DC, for U.S.

Dale W. Rhoades (argued and briefed), Rhoades, McKee, Boer, Goodrich & Titta, Grand Rapids, MI, for Detroit Intern. Bridge Co.

Walter H, Lubienski (briefed), Lubienski, Lubienski & Lubienski, Detroit, MI, Roger E. Craig (argued and briefed), Naples, FL, for Commodities Export Co. and Walter H. Lubienski.

Before: MERRITT, Chief Judge; and KEITH and SUHRHEINRICH, Circuit Judges.

KEITH, Circuit Judge.

Appellants, Walter H. Lubienski ("Lubienski") and Commodities Export Co. ("Commodities"), appeal the district court's decision denying their motion to intervene and their motion for a preliminary injunction in a condemnation proceeding involving Plaintiff-Appellee, the United States of America ("United States') and the Detroit International Bridge Company ("DIBC"). For the reasons stated below, we REVERSE the decision of the district court.

I.

This case arises from a 1979 condemnation proceeding initiated by the United States, as to land owned by the DIBC. The land at issue is located near the Ambassador Bridge in Detroit, Michigan, which connects Detroit to Windsor, Ontario, Canada. The United States sought DIBC's land for the purpose of expanding a Customs cargo facility, located adjacent to the Ambassador Bridge. On May 21, 1991, the United States (through the General Services Administration) entered into a settlement agreement with DIBC concerning the 1979 condemnation proceedings. This settlement agreement is entitled "GSA-DIBC" Memorandum of Agreement' (the "MOA"), and was executed by the United States and DIBC on March 28, 1991, and May 21, 1991.

Commodities operates a duty-free store on the Detroit side of the Ambassador Bridge. Lubienski owns a parcel of land near the Ambassador Bridge which is the subject of a separate condemnation proceeding. On December 30, 1991, Commodities and Lubienski filed motions in district court to intervene and for a preliminary injunction against the implementation of the MOA. Commodities and Lubienski contend that the MOA contemplates the condemnation of their land. On April 6, 1992, the district court denied both motions. On May 29, 1992, Commodities and Lubienski filed a Notice of Appeal with this Court. On appeal, they challenge the district

court's denial of their motions to intervene and for preliminary injunction. These issues are discussed seriatim below.

II.

Applying the standards set forth in the Federal Rules of Civil Procedure 24 ("Rule 24"), the district court ruled that Commodities and Lubienski were not entitled to either intervention as of right or permissive intervention. Rule 24 provides, in pertinent part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of rights of the original parties.

As the district court correctly noted, to qualify for intervention as a matter of right, Commodities and Lubienski must show four things:

> 1) an interest related to the property or transaction which is the subject of action;

2) that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect that interest;

3) that the intervenor's interest is not adequately represented by existing parties; and

4) that their application to intervene is timely

(R211: Opinion and Order of Trial Court, p. 6). This Court held in *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989), that "failure to meet one of the [four] criteria will require that the motion to intervene be denied." The district court ruled that Commodities and Lubienski failed to meet the four requirements for intervention as of right.

We review the court's ruling on intervention as of right *de novo*, except for the timeliness requirement which we review for an abuse of discretion. *Id.*

A.

[1] Relying on *Donaldson v. United States*, 400 U.S. 517, 531, 91 S. Ct. 534, 542, 27 L. Ed. 2d 580 (1971), the district court stated that in order to satisfy the first requirement, "a proposed intervenor must show *'a direct, significant legally protectable interest* in the property or transaction subject to the action' in which intervention is sought." (R211: Opinion and Order of Trial Court, p. 6) (emphasis in original). Applying the *Donaldson* test, the district court concluded that "it is clear that Commodities and Lubienski do not have such a 'direct, legally protectable interest' in the Segoian /DIBC property which is at issue in the instant action to entitle them to intervention as of right." *Id.* at 8.

Commodities and Lubienski are seeking to intervene in this action because they object to the MOA entered into between DIBC and the United States. The MOA provides, in perti-

nent part:

(1.1) The "GSA Site" means an area for an expanded Federal clearance facility that is generally bounded by Porter Street on the north, the Street on the east, Fort Street on the south, and the general vicinity of the Bridge span and Bridge plaza on the west, including the Overland Site as defined in paragraph (1.3).

(1.2) The "Expanded GSA Site" means an area including the GSA Site and additional land to the north and east of the GSA Site as set forth on the Approved Plan. Acquisition by GSA of the Expanded GSA Site represents the extent of GSA's land acquisition under the terms of this Agreement. It is the intention of the parties that future modification(s) of Federally-owned clearance facilities shall occur within the boundaries of the Expanded GSA Site.

(1.3) The "Overland Site" is the property which is the subject of the existing litigation between the United States of America and DIBC. This property is generally described as being south of Porter Street, north of Howard Street, west of 20th Street and east of 21st Street, excluding four lots in the northeast corner of the block. . . .

(1.9) "Approved Plan" shall be defined to mean the plan to be developed by GSA, and acceptable to DIBC under the terms and conditions of this Agreement. The Approved Plan shall incorporate land within the Expanded GSA Site and provide for an enlarged Federal clearance facility.

(6.1) GSA has been authorized to acquire the property defined as the GSA site. GSA shall act promptly to acquire and develop the Expanded GSA Site subject to compliance with applicable laws. . . .

(R203: GSA-DIBC Memorandum of Agreement, pp. 2-3,5,10).

The terms of the MOA indicate that it is designed to operate as the final judgment regarding the 1979 condemnation proceedings between the United States and DIBC. The MOA provides, in pertinent part:

> This Memorandum of Agreement ("Agreement") is made between the United States of America, acting by and through the General Services Administration ("GSA"); and the Detroit International Bridge Company ("DIBC"), and its successors and assigns, and is made to set forth certain principles to be applied in resolving an eminent domain lawsuit now pending between the parties hereto, United States of America v. Certain Land Situated in the City of Detroit, et. al., Civil No. 79-73934, United States District Court, Eastern District of Michigan. This Agreement envisions, is intended to lead to, and shall be part of the considerations for settlement of the lawsuit by a stipulation and further agreements of the parties incorporating the principles set forth herein.
>
> (8.4) It is understood by the parties that all agreements between GSA and DIBC as consideration for settlement of this litigation are subject to the review of the Attorney General and although settlement by utilizing said Agreement will be recommended, entry of a stipulation cannot be guaranteed. It is further understood that DIBC shall not be bound by this Agreement until and unless GSA is so bound. GSA agrees to negotiate in good faith with DIBC to achieve satisfactory compliance with or overcome any legal objections that the Attorney General may have to this Agreement.

(R203: GSA-DIBC Memorandum of Agreement, pp. 1, 29)

The United States concedes that the MOA "provides for the

future condemnation of an area which includes property owned by Commodities." (United States' Opposition to Motion to Intervene, p. 7,5). In their motions to intervene and for a preliminary injunction, Commodities and Lubienski explained their interest in this action:

> 6. There are three condemnations pertaining to this case. The first is this case which stems from 1979. The second started towards the end of 1900 and was to expand the 1979 site to include land bounded by Porter on the north, 20th Street on the east, Fort Street on the south, and the Ambassador Bridge on the west. The third is in the Environmental Assessment stage and is an L-shaped wedge of land extending north of Porter to the east-west alley between 21st and 20th Streets which line is extended to Ste. (sic) Anne Street and then south to Fort Street. Commodities and Lubienski are the principal landowners in the strip of land north of Porter in the third condemnation. Lubienski also owns land in the second condemnation which abuts and is south of Porter.
>
> 7. The three condemnations together are to constitute the site of the US Customs Cargo Inspection Facility. Although other federal agencies are involved, Customs is the key decision and policy maker for these condemnations. The third condemnation, unlike the first and second which were initiated by the General Services Administration ("GSA") acting for Customs, was proposed to GSA by DIBCO.

(R203: Motion to Intervene, pp. 2-3).

The United States and DIBC argue that Commodities and Lubienski have no "interest relating to the property or transaction which is the subject of this action" because the subject matter of this action is limited to the land and the parties involved in the original 1979 complaint. We disagree. The MOA clearly provides for the condemnation of Com-

modities and Lubienski's property and serves as a final settlement of the 1979 condemnation action. Therefore, we believe Commodities and Lubienski have a "direct, significant legally protectable interest" in the condemnation proceedings between the United States and DIBC.

B.

[2] We now turn to the second requirement for intervention as of right. Here, we must determine whether the disposition of the condemnation proceedings between the United States and DIBC, as a practical matter, impairs or impedes Commodities' and Lubienski's ability to protect their interests. *See Fed.R.Civ.P.* 24(a).

The district court held that "Commodities has not demonstrated how the condemnation of the subject property would impair its interest in its duty free shop . . . and that Lubienski already has a forum to contest the condemnation of its property by virtue of the on-going condemnation suit pending before Judge Zatkoff." (R211: Opinion and Order of Trial Court, p. 8-9). The court went on to state that even if Commodities and Lubienski's interests would be impaired by the disposition of this action, "the terms of the proposed settlement agreement themselves adequately protect Commodities and Lubienski's interests." *Id.*

We do not believe the terms of the MOA protects Commodities and Lubienski's interests when it provides for the condemnation of their land, and is subject to being implemented without their input or approval. In fact, Commodities and Lubienski would be unfairly disadvantaged if their land is condemned by the United States before being given the opportunity to assert their interests in this matter. This result would place Commodities and Lubienski at a serious disadvantage, because once a condemnation suit is commenced, they would have no constitutional right to a hearing on questions relating to necessity and expediency. *See Bragg v.*

Weaver, 251 U.S. 57, 58 (1919). Therefore, we hold that the disposition of the condemnation proceedings at issue would impair the ability of Commodities and Lubienski to protect their interest.

C.

[3] To satisfy the third requirement for intervention as of right, Commodities and Lubienski must show that their interests in this action are "not adequately represented by existing parties." *Fed.R. Civ.P. 24. In Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915, 83 S. Ct. 1298, 10 L. Ed. 2d 415 (1963), the Eighth Circuit stated that the inadequate representation requirement may be shown in the following manner:

> [B]y proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in the fulfillment of his duty.

Id. at 919. We find the Eighth Circuit's reasoning helpful in determining whether Commodities and Lubienski's interest are adequately represented by any of the parties involved in the condemnation proceedings between the United States and DIBC.

The following pleadings from Commodities and Lubienski's motion to intervene demonstrates that their interests are not adequately represented by the existing parties in this action.

> 2. The defendant Detroit International Bridge Company ("DIBCO") owns the Ambassador Bridge and formerly the Overland Freight Terminal which is the chief piece of land constituting the subject matter of this condemnation suit. The same people - the Manuel J. Moroun family - who own and control DIBCO also own the Ammex duty-free store on the Ambassador Bridge which

is in direct competition with Commodities. Commodities is Ammex's only competitor. The Ammex duty-free store at the Detroit-Windsor Tunnel has no competition. According to articles published in the Detroit *News*, May 19-21, 1991, Moroun controls a $550 million fortune. See attached chart from page 14A, Sunday Detroit News, May 19, 1991, which shows the Ambassador Bridge and Ammex as Moroun holdings.

3. Over the past few years, Commodities has rebuffed offers to sell out from Moroun representatives.

4. Duty-free stores are supervised by the US Customs Service ("Customs"). Since March, 1988, Commodities and Customs have been involved in bitter litigation against each other. Background to this litigation is to be found in the Sixth Circuit's decision in *Commodities Export Co v US Customs Service*, 888 F.2d 431 (6th Cir 1989) (sic)....

7. The three condemnations together are to constitute the site of the US Customs Cargo Inspection Facility. Although other federal agencies are involved, Customs is the key decision and policy maker for these condemnations. The third condemnation, unlike the first and the second which were initiated by the General Services Administration ("GSA") acting for Customs, was proposed to GSA by DIBCO.

(R203: Motion to Intervene, pp. 2-3)

It is clear from Commodities and Lubienski's motion to intervene that neither the United States nor DIBC will adequately represent their interests in this action. Accordingly, we find that Commodities and Lubienski have satisfied the third requirement for intervention as of right.

D.

As for the timeliness of Commodities and Lubienski's motion to intervene, the district court stated that it was "not satisfied that the proposed intervenors have established that they had no way of learning of the proposed agreement before December 1991 so as to render the instant December 30, 1991 motion to intervene timely." We review this decision for an abuse of discretion.

The Ninth Circuit's decision in *Legal Aid Soc. of Alameda Co. v. Dunlop*, 618 F.2d 48 (9th Cir. 1980), is helpful in reviewing the district court's ruling on the timeliness question. The *Dunlop* Court held that "[a]ll of the circumstances of a case must be considered in ascertaining whether or not a motion to intervene is timely under Fed.R.Civ.P. 24." *Id.* at 51. We believe the district court failed to consider all of the circumstances of this case in ruling on the timeliness of Commodities' and Lubienski's motion to intervene.

The MOA is dated March 28, 1991. Commodities and Lubienski filed their motion to intervene on December 30, 1991. In their motion to intervene, they concede that they were aware of "talk and speculation in the media about an agreement between DIBCO and GSA," but that they were unaware of the"'actual terms of the agreement" or the fact that the agreement "was to settle this particular lawsuit" until December 9, 1991. (R203: Motion to Intervene, p. 3). Commodities and Lubienski also stated in their motion that during their negotiations with GSA they "were told by Michael Gelber, the GSA project manager for the third condemnation, that no plan was final yet and that GSA would consider alternate plans proposed by Commodities." *Id.* Lubienski also filed a motion to compel discovery of certain documents regarding the condemnation proceedings involving his land. *Id.* at 4. The United States objected to this request on May 1, 1991, on the grounds that the documents sought were not relevant to the condemnation proceeding. *Id.* Lubienski argues that had the United States complied with his discovery requests, he "would have discovered the existence

of [the MOA] and would have been able to move for intervention earlier." *Id.*

In ruling on the timeliness of Commodities and Lubienski's motion to intervene, the district court focused on Lubienski's contention that he would have filed for intervention earlier had the United States disclosed the MOA pursuant to his discovery request. The district court dismissed this argument by stating that there is "no indication when [Lubienski's] motion was filed." (R211: Opinion and Order of Trial Court, p. 10). The court minimally addressed the timeliness issue in its written opinion, merely stating that it was "not satisfied that the proposed intervenors have established that they had no way of learning of the proposed agreement before December 1991 so as to render the instant December 30, 1991 motion to intervene timely." *Id.* We think the court's analysis and consideration of the circumstances surrounding this case was inadequate and falls below the *Dunlop* standard. Our review of the relevant circumstances indicates that neither Commodities nor Lubienski were delinquent in filing their motion to intervene. Accordingly, we hold that the district court abused its discretion in ruling that Commodities and Lubienski's motion to intervene was untimely.

Commodities and Lubienski's motion to intervene satisfies the four requirements for intervention as of right. Therefore, we reverse the district court's ruling and remand for the court to enter an order permitting intervention.

III.

The district court denied Commodities and Lubienski's motion for preliminary injunction. We review the district court's decision for an abuse of discretion. *See International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2941, 119 L Ed. 2d 565 (1992).

In determining whether the district court abused its discretion in denying Commodities and Lubienski's motion for preliminary injunction we must consider four factors:

> 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4) Whether the public interest would be served by issuing a preliminary injunction.

Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977).

Because we hold that Commodities and Lubienski are entitled to intervention as a matter of right, the question of whether they are also entitled to a preliminary injunction must be reconsidered. Therefore, we reverse the district court's decision denying the motion for a preliminary injunction and remand for the court to reconsider this motion in light of our decision granting intervention.

IV.

For the foregoing reasons, we **REVERSE** the decision of the district court and **REMAND** for proceedings consistent with this opinion.

MERRITT, Chief Judge, concurring.

I concur in the court's opinion but write separately in order to reinforce the court's conclusion with additional considerations. Essentially, the court below held that Commodities

and Lubienski do not have a sufficient interest in the outcome of the case to justify intervention. This is a question of standing,[1] and the district court relies heavily on standing cases in reaching its decision. The court places primary reliance upon *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), which held that "[t]he interest of a proposed intervenor . . . must be greater than the interest sufficient to satisfy the standing requirement." *Id.* at 859. The district court also cites *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984), *cert. denied*, 469 U.S. 1019, 105 S. Ct. 434, 83 L. Ed. 2d 360 (1984) ("a party has no standing to assert a right it if is not his own"). The court's unstated reliance on the standing doctrine is mistaken in two respects. First, the Sixth Circuit does not require an applicant for intervention to have standing to sue. Second, if the district court had properly determined the scope of the lawsuit, it would have held that Commodities and Lubienski do have standing.

The Supreme Court has not decided whether a party seeking intervention under Rule 24 must establish Article III standing, and the courts of appeals have reached different conclusions. *See Diamond v. Charles*, 476 U.S. 54, 68-59, n. 21, 106 S. Ct. 1697, 1706-1707, n. 21, 90 L. Ed. 2d 48 (1986). The Seventh Circuit has held that in a condemnation suit an applicant for intervention must establish an interest greater than that necessary for standing. *36.96 Acres of Land*, 754 F.2d 855. The district court relies heavily upon *36.96 Acres of Land* in reaching its decision that Commodities and Lubienski do not have a legal interest sufficient to warrant intervention. The Sixth Circuit does not, however, follow *36.96 Acres of Land*. This court has held that "a party seeking to intervene need not possess the standing necessary

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[1]The related question whether the issues raised by Commodities and Lubienski are ripe for adjudication was not addressed by the district court, nor have the parties raised the issues on appeal. We do not, therefore, address the ripeness issue.

to initiate a lawsuit." *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Although *Purnell* involved applicants whose standing was conditioned upon their ability to establish paternity, the court relied upon cases not involving contingent standing: *Trbovich v. United Mine Workers*, 404 U.S. 528, 536 (1972) ("Intervention by union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the union to relatively little additional burden.") (citing with approval Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 726 (1968) ("the case or controversy limitation should impose no barrier to [an applicant for intervention's] admission")), and *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("there was no need to impose the standing requirement upon the proposed intervenor").

Even if standing to bring suit were required, the district court's characterization of Commodities and Lubienski's motion to intervene as an attempt to interfere with the government's efforts to condemn the property of Logoian and DIBC is inaccurate. Rule 24(a) allows intervention as a right to an applicant claiming "an interest relating to the property or transaction which is the *subject of the action* and the applicant is so situated that the *disposition of the action may as a practical matter* impair or impede the applicant's ability to protect that interest." (emphasis added). The subject matter of an action is not limited by the complaint. *Linton by Arnold v. Commissioner of Health and Envir.*, 973 F.2d 1311 (6th Cir. 1992), is an example of a case in which a court's disposition of an action expands the scope of the lawsuit beyond the complaint. *Linton* was initiated and tried on a single issue, but applicants were allowed to intervene after the court adopted a plan raising new issues of interest to the applicants for intervention. *Id.* at 1318. Another example is provided by *Bachman v. Hecht*, 659 F. Supp. 308, 311 (D.V.I. 1986), cited by the district court, in which the Virgin Islands court considered not only the applicants' interest in the "only remaining controversy in the case," the status of a

plot of land, but also the applicants' interest in other issues resolved in a settlement agreement. If the district court approves the proposed settlement agreement in this case, its "disposition of the matter" may "as a practical matter" impede Commodities and Lubienski's ability to protect their interest *in their own land.* Commodities and Lubienski obviously have standing to assert their interest in their own land.

The ruling of the court below on timeliness seems to be based upon mere passage of time, an insufficient basis for denying a motion to intervene. *See, e. g., Bank of American v. Hotel Rittenhouse Assocs.*, 844 F.2d 1050, 1056 (3d Cir. 1988).

> In considering whether an application is timely, a court should consider five factors: (a) the point to which the suit has progressed; (b) the purpose for which intervention is sought; (c) the length of time preceding the application during which the applicant knew or reasonably should have known of its interest in the case; (d) prejudice to the original parties due to the failure of the applicant to apply promptly for intervention upon acquiring the knowledge of its interest; and (e) any unusual circumstances of the case.

Linton by Arnold v. Commissioner of Health and Envir., 973 F.2d 1311, 1317 (6th Cir. 1992).

In Linton, this court reversed a district court ruling that an application for intervention was untimely. *Linton* involved a challenge to Tennessee's implementation of the Medicaid Act. The district court held that Tennessee's policy violated the Act, and ordered the state to submit a plan redressing the violation. The court adopted the state's plan in its entirety. Twenty-five days after entry of final judgment, and two and a half years after the suit was brought, six nursing homes moved to intervene to appeal the judgment. The district court denied the motion as untimely. The court of appeals re-

versed, holding that the applicants had no reason to intervene prior to the district court's adoption of the state's plan because they were "not privy to the terms and conditions" of the state's plan until it was filed with the court and did not know until entry of final judgment that the court would adopt the plan in its entirety. There is no evidence in the record before us that Commodities and Lubienski were privy to the terms and conditions of the MOA prior to December 9, 1991, when they obtained a copy of the agreement through a Freedom of Information Act request. The *Linton* court also based its decision upon "unusual circumstances militating in favor of intervention." The action had been initiated on a single issue that implicated the interests of only one of the movants; it was the broader terms of the new plan which implicated the interests of the other applicants. *Id.* at 1318. The instant case was also initiated on a limited issue which did not directly concern the applicants; it was the more comprehensive settlement agreement which gave rise to Commodities and Lubienski's interest in the case.

The circuit's permissive approach to intervention is supported by the reasoning of the district court in *In re Acushnet River & New Bedford Harbor,* 712 F. Supp. 1019 (D. Mass. 1989):

> On these facts, this Court refuses to hold the application untimely as a matter of law. To do otherwise would promote a sort of prophylactic intervention whereby parties would be compelled to intervene in matters simply to protect their rights to participate in those matters downstream on the more or less remote chance that a party apparently protecting the intervenors' interests might someday betray them. Such a result would obviously be expensive and inefficient.

Id. at 1023-24. This reasoning applies as well to parties who do not know that the outcome of settlement negotiations will be to their detriment (or will even concern them at all).

Commodities and Lubienski's interest in the original condemnation suit was so remote that if they had tried to intervene before the terms of the proposed settlement were known, the district court would likely have held that they had no legally protectable interest in the case. *See* R211: Opinion and Order of Trial Court, p.8 (holding that because Commodities and Lubienski do not have a direct interest in the property at issue in the condemnation suit, they do not have direct, legally protectable interest).

Considering all of the factors set out in *Linton, supra* p. 504, I agree that the district court abused its discretion in ruling that Commodities and Lubienski's motion to intervene was untimely. The suit had progressed to settlement, which was the earliest point at which the applicants could challenge the settlement agreement. Intervention was sought for the legitimate purpose of challenging a settlement agreement which prejudices the interests of the applicants. There was no evidence to contradict the applicants' proof that they acted promptly upon learning of their interest in the case. Any prejudice to the original parties caused by the applicants' intervention does not result from the applicants' "failure to apply promptly for intervention upon acquiring the knowledge of [their] interest." Finally, there are "unusual circumstances" in this case: the action as originally filed concerned only the property of Logoian and DIBC, but the subject matter of the case was expanded by the MOA which contemplates condemnation of the applicants' land as well.

873 F. Supp. 1050 (E.D.Mich. 1994)

No. 79-73934

Unites States District Court
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA

Plaintiff,

V

CERTAIN LAND SITUATED IN THE CITY OF DETROIT, WAYNE COUNTY, MICHIGAN; and The Detroit International Bridge Company, et al.,

Defendants,

V

COMMODITIES EXPORT COMPANY and Walter H. Lubienski,

Intervenors.

December 30, 1994

Owners of duty free shop on United States' side of international bridge sought preliminary injunction to prevent condemnation of portion of their property for expanded customs inspection station. The District Court, Rosen, J.,, held that owners failed to show likelihood of success on the merits needed for preliminary injunctive relief.

Denied.

1. **Eminent Domain Key # 292**

Owners of duty free shop located on United States' side of international bridge were not entitled to preliminary injunction to preclude condemnation of portion of their parking lot for construction of expanded customs facility; Congress authorized condemnation under Public Buildings Act, and expansion served public purpose, despite use of funding from private bridge company.

2. **Eminent Domain Key # 5**

Congress need not authorize condemnation of specific parcels or uses, general authority of Administrator of General Services Administration is sufficient.

3. **Eminent Domain Key # 8**

Appropriations act need not refer to specific parcel of land at issue in condemnation; that is required is that project come within class of expenditures that Congress intended to authorize.

4. **Eminent Domain Key # 171**

Health and Environment Key # 25.10(3)

Lack of environmental impact statement or final environmental assessment does not defeat government's right to condemn.

5. **Eminent Domain Key # 306**

Injunctive relief is not available to bar taking of private property for public use since compensation is available.

6. Eminent Domain Key # 67

Courts are not to second guess determination that taking is for public purpose when Congress has authorized condemnation.

Donald F. Rosendorf, Washington, DC, Roger E. Craig, Naples, Fl, Walter H. Lubienski, Detroit, MI, for plaintiff.

James F. Hibey, Washington, DC, Dale W. Rhodes, Grand Rapids, MI, for defendants.

OPINION AND ORDER REGARDING INTERVENORS' MOTION FOR PRELIMINARY INJUNCTION

ROSEN, District Judge.

I. *INTRODUCTION*

On October 12, 1993, the Sixth Circuit reversed this Court's decision denying Commodities Export Company and Walter H. Lubienski's motion to intervene in this condemnation action, holding that Commodities and Lubienski were entitled to intervention as a matter of right. In so doing, the appellate court made no determination and no findings, with respect to Commodities and Lubienski's proposed motion for preliminary injunction,[1] and instead ordered that the case be remanded to this Court for a determination of the intervenors' entitlement to the requested preliminary injunctive relief.

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[1]Because the Court had determined that Commodities and Lubienski lacked standing to intervene in this action, in the April 3, 1992 Opinion and Order denying Commodities' and Lubienski's motion to intervene, the Court also summarily ordered that the (then) proposed intervenors' motion for preliminary injunction be denied.

With respect to the motion for preliminary injunction the Court of Appeals stated only the following:

> The district court denied Commodities and Lubienski's motion for preliminary injunction. We review the district court's decision for an abuse of discretion. *See International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2941, 119 L Ed. 2d 565 (1992).
>
> In determining whether the district court abused its discretion in denying Commodities and Lubienski's motion for preliminary injunction we must consider four factors:
>
> 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
>
> 2) Whether the plaintiffs have shown irreparable injury;
>
> 3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
>
> 4) Whether the public interest would be served by issuing a preliminary injunction.
>
> *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977).
>
> Because we hold that Commodities and Lubienski are entitled to intervention as a matter of right, the question of whether they are also entitled to a preliminary injunction must be reconsidered. Therefore, we reverse the district court's decision denying the motion for a preliminary injunction and remand for the court to reconsider this motion in light of our decision granting intervention.

United States v. Detroit International Bridge Co., et al., 7 F.3d 497, 503 (6th Cir. 1993).

Accordingly, pursuant to the Sixth Circuit's directive, this matter is now once again before the Court on the Intervenors' Motion for a Preliminary Injunction.[2]

In this Motion, Commodities and Lubienski seek to enjoin the implementation of the March 28, 1991 GSA-DIBC Memorandum of Agreement ("MOA"). Specifically, the Intervenors *"seek an injunction enjoining the [anticipated] condemnation of lands belonging to the them* ... and any interference or tampering with ingress or egress to or from said lands," as contemplated in the MOA. [See p. 1 of Intervenors' initial Brief in Support of their Motion for Preliminary Injunction.]

The Court conducted a hearing on the Motion on June 22, 1994. Following the hearing, the Court took the matter under advisement and directed the parties to file supplemental briefs on issues raised during oral argument but not fully briefed. All parties subsequently filed several "supplemental" briefs and responses and replies thereto.

Having reviewed and considered all of the briefs and supporting documents submitted in this matter, and having further considered the oral arguments of counsel, the Court is now prepared to rule on the Intervenors' Motion. This Opinion and Order sets forth that ruling.

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[2]To the extent that Commodities and Lubienski suggest that the Sixth Circuit made substantive findings regarding their motion for preliminary injunction and "irreparable harm", as the excerpt from the appellate court's opinion demonstrates, such a suggestion is without merit.

II. *PERTINENT FACTS*

A. *THE PARTIES*

The Detroit International Bridge Company ("DIBC") owns and operates the Ambassador Bridge which connects Detroit, Michigan with Windsor, Ontario, Canada. Commodities Export Company ("Commodities") operates a "duty-free" shop which is located on a parcel of land on the Detroit side of Ambassador Bridge. Walter Lubienski is the owner of Commodities.

In 1991, DIBC and the United States Government, acting through the General Services Administration (the "GSA"), entered into a Memorandum of Agreement ("MOA") pertaining to the Government's condemnation of property for the expansion of the Ambassador Bridge, U.S. Customs inspection facility. Part of the expansion of the customs facility contemplated under the MOA includes an expansion of a truck ramp from the Bridge.

A small portion of the land contemplated to be condemned pursuant to the MOA is owned by Commodities and Lubienski. However, no actual condemnation proceedings have yet been commenced with respect to the Commodities property.

In their Motion for Preliminary Injunction, Commodities and Lubienski seek to preclude the anticipated condemnation of their property. It is Commodities' and Lubienski's belief that the only reason condemnation of their property is being sought is to put Commodities out-of-business.[3] Apparently,

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[3]Commodities sole competitor in the "duty-free" market in Detroit is Ammex, Inc. Ammex is owned by Manuel J. Moroun. Moroun is also a 49% shareholder of CenTra, Inc., the holding company which owns DIBC. It is the commonality of principal ownership of DIBC and Ammex by Mr. Moroun which forms the basis of Commodities and Lubienski's belief that the only reason condemnation of their property is

Intervenors believe that the contemplated condemnation of Commodities property will be a condemnation of the whole parcel of land on which the duty-free store is located.

The Government, however, has advised the Court that GSA's intentions are not to condemn all of Commodities' property. [Plaintiff's July 18, 1994 Supplemental Brief, p. 2.][4] Rather, GSA intends to condemn only a small corner of the duty-free shop's parking lot, in fee, for the expanded truck ramp, and take an additional easement for ingress and egress over the parking lot to a Government parking lot adjoining the Commodities land. *Id.* The easement would be open at all times to Commodities for its own use. [See diagram attached to this Opinion and Order as Exhibit A.]

III. *DISCUSSION*

As indicated above, the Sixth Circuit has remanded this matter to this Court for reconsideration of Commodities' and Lubienski's Motion for Preliminary Injunction, and has directed that in deciding that matter, the Court is to consider four factors:

> 1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the

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sought is to put Commodities out of business. Because DIBC is providing a substantial amount of the funding for the proposed Ambassador Bridge customs facility expansion, Commodities and Lubienski believe that the Government is going to condemn their property and put Commodities out of business for the benefit of DIBC.

[4]The Intervenors have moved lo strike the Government's July 18, 1994 Supplemental Brief because it exceeds the five-page limitation on reply briefs set forth in Local Rule 7.1(d). This Supplemental Brief, however, is not a "Reply Brief"; it is a "Supplemental Brief", filed in accordance with this Court's directives. Further, the Court set no specific page limit for the supplemental briefs it invited the parties to file. For these reasons, Intervenors' Motion to Strike Plaintiff's Supplemental Brief is DENIED.

merits;

2) Whether the plaintiffs, have shown irreparable injury;

3) Whether the issuance of a preliminary injunction would cause substantial harm to others;

4) Whether the public interest would be served by issuing a preliminary injunction.

A. *Likelihood of Success on the Merits*

[1] Although it is undisputed that no actual condemnation of Intervenors' property has yet been sought, because Commodities and Lubienski seek to preclude the "contemplated" condemnation of their property, their proof of "likelihood of success on the merits" for purposes of prevailing at this preliminary injunction phase, necessitates a consideration of whether it is likely that they will succeed once condemnation proceedings are instituted.

All parties - the Government, the Bridge Company and the Intervenors - are in agreement that in condemnation proceedings, the inquiry focuses on the satisfaction of two elements:

(1) Is the project which is the object of condemnation "authorized" by Congress; and

(2) Does the project have a "public purpose"?

See, Berman v. Parker, 348 U.S. 26, 33-35, 75 S.Ct. 98, 102-104, 99 L. Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 240-242, 104 S. Ct. 2321, 2329-2330, 81 L. Ed. 2d 186 (1984); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992).

1. *Has Condemnation of Intervenors' Property Been Autho-*

rized by Congress?

Commodities and Lubienski's principal argument on the "likelihood of success on the merits" is that there is no legislation authorizing the condemnation of their property, and therefore, they argue that the condemnation of their property is invalid.

The basis for this argument is the intervenors' reading of the three pieces of appropriations legislation dealing with the project for the expansion of the Ambassador Bridge Inspection Facility, i.e., Public Law 100-202, 101 Stat. 1329-401 to 403, Public Law 100-440, 102 Stat. 1732-33, and Public Law 102-393, 106 Stat. 1729, 1751.

In pertinent part, these statutes provide as follows: *Public Law 100-202* (December 22, 1987)

1987)

GENERAL SERVICES
ADMINISTRATION

FEDERAL BUILDINGS FUND

The revenues and collections deposited into the [GSA Federal Buildings Fund] ... shall be available for ... acquisition of buildings and sites by purchase, condemnation, or as otherwise authorized by law ... as follows:

* * * * * *

Michigan:

Detroit, Ambassador Bridge Cargo Inspection Facility, Site, $3,800,000

* * * * * *

Provided ... That all funds for direct construction projects

shall expire on September 30, 1989, and remain in the Federal Buildings Fund except funds for projects as to which funds for design or other funds have been obligated in whole or in part prior to that date....

Public Law 100-440 (September 22, 1988)

GENERAL SERVICES
ADMINISTRATION

FEDERAL BUILDINGS FUND

The revenues and collections deposited into the [GSA Federal Buildings Fund] ... shall be available for ... acquisition of buildings and sites by purchase, condemnation or as otherwise authorized by law ... as follows:

* * * * * *

Michigan:

Detroit, Ambassador Bridge Cargo Inspection Facility, $10,197,000

* * * * * *

Provided ... That all funds for direct construction projects, shall expire on September 30, 1990, and remain in the Federal Buildings Fund except funds for projects as to which design or other funds have been obligated in whole or in part prior to such date.

Public Law 102-393 (October 6, 1992)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated out of any money in the Treasury not otherwise appropriated ... for

certain ... Agencies, for the fiscal year ending September 30, 1993, and for other purposes, namely:

SEC. 11 (a) Notwithstanding any other provision of law, the General Services Administration is authorized to accept funds from the Detroit International Bridge Company pursuant to a memorandum of agreement dated March 28, 1991, and to deposit such funds into the Fund established under section 210(f) of the Federal Property and Administrative Services Act and further, is authorized to use such funds, in addition to all amounts received pursuant to Public Law 100-202 and Public Law 100-440 as new obligational authority in said Fund, in furtherance of the Ambassador Bridge Cargo Inspection Facility project in Detroit, Michigan.
(b) There are hereby appropriated out of said Fund without limitation as to fiscal year such sums as are received pursuant to subsection (a).

[Intervenors' Ex. H.]

The Intervenors contend that (1) because none of these three statutes say anything about condemning their specific parcel of property, the Court must find that condemnation of their property has not been "authorized by Congress", and (2) even if these three provisions did authorize the taking of their land, that authority has expired. It is the Intervenors position that P.L. 100-202's authority expired on September 30, 1989, P.L. 100-440's authority expired on September 30, 1990, and P.L. 102-393's authority expired on September 30, 1993.

First, to the extent that Intervenors believe that it is only through P.L. 100-202, 100-440, and/or P.L. 102-393 that condemnation of the property at issue may be found to have been authorized, they are mistaken.

As indicated above, all three of these statutes are appropriations statutes. The Supreme Court and the Sixth Circuit have

made clear that, while appropriations acts may provide authority for the GSA to condemn property for a particular purpose, they are not the sole source for such authorization.

In *United States v. Certain Real Estate Lying on the South Side of Broad Street, in the City of Nashville, Tennessee*, 217 F.2d 920 (6th Cir. 1954), the District Court determined that the condemnation of a parcel of land was illegal for lack of Congressional authorization because it was not put to the specific use specified in the appropriations statute. The appropriations statute had authorized the appropriation of funds to construct a new Federal office building in Nashville, Tennessee. However, one tract of land, Tract 14, was not used for the construction project. Rather, after funds were appropriated, the Government changed its mind twice as to how the particular tract should be utilized. First, it was decided that the land should be cleared and used as a parking lot in connection with the new building. That plan was abandoned, and instead, a plan was put into effect whereby the old building that was on Tract 14 was to be remodeled and used by the Government for storage.

The District Court determined that the condemnation of Tract 14 was illegal because the ultimate use of the property decided upon was not authorized by the appropriations act. The Sixth Circuit reversed the District Court's determination, finding sufficient authority for the condemnation of Tract 14 in the "general" condemnation provisions of the Public Buildings Act - the same statute at issue in this case. The Sixth Circuit explained its holding in the Nashville case as follows:

[T]he Act of December 28, 1945, [59 Stat. 638],[5] which

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[5] The Act of December 28, 1945, 59 Stat. 639, provided:

"Federal office building, Nashville, Tennessee: For the acquisition of a site in Nashville, Tennessee, by purchase, condemnation, or

appropriated funds for the construction of a new Federal Office Building in Nashville places no limitation upon the general authority to condemn property for public use as provided in the [Public Buildings] Act of May 25, 1926, as amended, U.S.C.A., title 40, section 341 [now replaced by the Public Buildings Act of 1959, as amended, 40 U.S.C. § 601, *et seq.*]. Contrary to the District Court's view, this Act is not in our judgment merely procedural, investing the Administrator with the power to condemn only where Congress has appropriated funds for a particular acquisition of property. Authority to condemn must, of course, always have its source in a statute, *Hooe v. United States,* 218 U.S. 322, 335, 336, 31 S. Ct. 85 [89, 89], 54 L. Ed. 1055 [1910]; and where no other Act of Congress vests power to condemn property, an applicable appropriation Act may be looked to as the source of such power. [Citations omitted.] But the authority to condemn is not negatived or affected by the limitations fixed upon costs in the authorization of a Government official to purchase property for a particular use.

* * * * * *

In our view, the reasoning of the opinion of the Supreme Court in *United States v. Carmack,* 329 U.S. 230, 236, 242, 243, 247, 67 S. Ct. 252, 254 [257, 258, 260], 91 L. Ed. 209 [1946], leads to the inescapable conclusion that the District Court committed reversible error in the case at bar. There the highest court asserted that both the general Condemnation Act and the Public Buildings Act expressly authorized the acquisition by condemnation of land by the United States as a site for a United States post office, customhouse, or courthouse.

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otherwise, and the construction thereon of a new Federal office building for the use and accommodation of the United States, including the Veterans' Administration, $5,575,000."

> General authority to condemn in furtherance of stated programs was conferred; and neither Act imposed expressly any limitation upon the authority of the officials designated by Congress to exercise the power of condemnation in procuring sites for public buildings deemed necessary to such officials to enable the Government to perform certain specified functions. The opinion writer stated: ". . . [T]his Court must be slow to read into [these general condemnation] statutes today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely." Authority was found to be vested in the designated officials, by the broad terms of the Public Buildings Act, to select the sites which they chose.... [T]he comparative desirability and necessity for a site were matters for legislative or administrative determination, rather than for a judicial finding.

217 F.2d at 925-926.

[2] The *Nashville* case makes clear that there is no requirement of specificity with respect to parcels or uses for a condemnation to be found to have been duly authorized by Congress. The general authority of the Administrator the General Services Administration is sufficient.

Moreover, a simple reading of the three appropriations statutes in question in this case demonstrate the lack of merit in the Intervenors' argument of no authorization for the condemnation of their property.

First of all, the Court notes that Intervenors concede that P.L. 100-202 and P.L. 100-440 contain express powers to condemn. However, they contend that none of the statutes provide any authority for the condemnation of their particular parcel of land.

[3] The law is settled that an appropriations act need not

refer to the specific parcel of land at issue; all that is required is that the project come within the class of expenditures that Congress intended to authorize. *United States v. Right to Use and Occupy 3.38 Acres of Land*, 484 F.2d 1140 (4th Cir. 1973); *United States v. Kennedy*, 278 F.2d 121 (9th Cir. 1960).

In this case, Public Law 102-393 expressly references the MOA, and the MOA specifically deals with the condemnation of a parcel of land which includes Intervenors' property (calling it the "Expanded GSA site").[6] Furthermore, by its terms, P.L. 102-393 incorporates by reference the two earlier appropriations statutes. The express statement of authority in P.I. 102-393 provides that GSA ***"is authorized to use such funds, in addition to all amounts received pursuant to Public Law 100-202 and Public Law 100-440*** as new obligational authority ... ***in furtherance of the Ambassador Bridge Cargo Inspection Facility project in Detroit, Michigan."*** Here, P.L. 102-393 authorizes GSA to accept monies from DIBC and *to use such funds as provided in the two earlier pieces of legislation.*

Intervenors further contend that all authority provided in the three statutes has now expired. Intervenors are mistaken. With respect to the first two statutes, P.L. 100-202 and P.L. 100-440, they contain express caveats to the fiscal year 1989 and 1990 expiration dates for any "funds [which] have been obligated in whole or in part prior to that [close of fiscal year expiration] date."[7]

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[6]The "Expanded GSA Site" is defined in the MOA as "an area including the GSA site (which was previously condemned property) and *additional land to the north and east of the GSA site."*

[7]With respect to P.L. 100-202, Intervenors completely ignore the fact that this statute deals only with "site" acquisition *not* "direct construction". It is only appropriations for "direct construction" projects that expired at the end of the fiscal year. (The Court notes that the Ambassador Bridge

With respect to P.L. 102-393, Intervenors overlook the express provision in Section 11(b) that the authorized appropriation and use of funds paid to GSA by DIBC pursuant to the MOA is *"without limitation as to fiscal year."*[8]

Commodities and Lubienski also argue with respect to "lack of authority" that Congressional condemnation authority is limited to the property described in the Environmental Impact Statement ("EIS") issued in January 1989. Intervenors argue that the condemnation authority granted by Congress to GSA is limited to the property as described in the EIS. Because their property was not included in the January 1989 EIS, Intervenors claim that the condemnation was not authorized.

Again, Intervenors want the Court to ignore the full facts of this matter. In February 1992, a Final Environmental Assessment ("EA") was issued which expressly covers Commodities' and Lubienski's property:

> In June 1989, the General Services Administration (GSA) completed an Environmental Impact Statement for the expansion of the present Federal Inspection Facility at Ambassador Bridge, Detroit, Wayne County, Michi-

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project was not the only project covered in P.L. 100-202 and 100-440; numerous other projects, some of which were "site" acquisitions, some were "design" projects, and some were "construction" projects.)

[8]To the extent that Commodities and Lubienski rely on the Government's "change of position" with respect to the configuration of the Bridge off ramp since former U.S. Attorney Steven Markman's involvement in the matter, as the Sixth Circuit found in *Gibson & Perin Co. v. City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), *cert. denied* 414 U.S. 1068, 94 S. Ct. 577, 38 L. Ed. 2d 473 (1973) there is no requirement that aggrieved landowners be given notice of a change of boundaries of land to be condemned, even if the change in boundaries is decided upon after the condemnation has been approved by the appropriate authorities.

gan. The expansion was to include acquiring approximately 11 acres of land adjacent to the existing facility.... The boundaries of the expanded facility are 20th Street on the east, Porter Street to the north, Fort Street to the south and the north-south alley between 21st and 22nd Streets, that runs parallel to the east side of the Bridge and the Bridge Plaza on the west.

The current proposal that is to be the subject of this Environmental Assessment (EA) is for the GSA to acquire additional parcels of land adjacent to the expanded Ambassador Bridge Customs Inspection Facility. These additional parcels assume an "L" shaped configuration bounded by the south line of the east-west alley north of Porter Street on the north, the west line of the north-south alley between 20th Street and Ste. Anne Street on the east, the west line of 20th and 21st Streets on the west and the north line of Fort Street on the south. This acquisition will permit a redesign of the proposed facility including the construction of two bridge lanes for commercial vehicles that come directly off the Bridge without passing through the existing bridge plaza and the potential to expand the number of inspection booths from six to nine.

* * * * * *

[T]he proposed project is a modification of an approved development.... Other adjustments to the boundaries also were examined and found not to be reasonable alternatives, ***including the plans submitted by Commodities Export Company*** *as design options that would avoid the site of a duty-free store owned by the company to the north of Porter....*

[Intervenors' Ex. J.; DIBC Reply Brief Ex. E.]

The foregoing belies Intervenors' contention that, but for

this preliminary injunction action, they have had no opportunity to be heard with respect to the Bridge expansion and the attendant condemnation of their land contemplated by the MOA.

[4] Furthermore, even if no EIS or EA had been performed, this would not defeat the Government's right to condemn. Intervenors' argument predicated upon the lack of an EIS addressing their parcel of property is the same one made and rejected by the Ninth Circuit in *United States v. 0.95 Acres of Land*, 994 F.2d 696 (9th Cir. 1993). In that case, the court held:

> NEPA cannot be used as a defense to the condemnation action. The filing of a condemnation action and the subsequent transfer of legal title are not "major Federal actions significantly affecting the environment."

Id. at 699.

The Ninth Circuit went on to note, that once the condemnation and transfer of title has occurred, NEPA might be applicable, however ***the environmental statute has no impact whatsoever on the sovereign power to condemn.*** *Id. See also, United States v. 255.25 Acres of Land*, 553 F.2d 571 (8th Cir. 1977); *United States v. 178.15 Acres of Land*, 543 F.2d 1391 (4th Cir. 1976).

The foregoing makes clear that there is no legal merit to Commodities' and Lubienski's argument that condemnation of their property was not "authorized" by Congress.[9]

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[9]Intervenors misrepresent in their Brief that the Sixth Circuit established the "law-of-the-case" and held in its October 12, 1993 Opinion that condemnation of their property would be neither "necessary" nor "fair". This is a mischaracterization of the Sixth Circuit decision on this matter. As indicated above, the Sixth Circuit took *no position* whatsoever regarding the merits of Intervenors motion for preliminary injunction.

2. *Does the Ambassador Bridge Expansion Project Have a Public Purpose"?*

There appears to be no contest that the construction and improvement of federal government facilities or public roads and bridges constitutes a "public purpose." *See, e.g., Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 706, 43 S. Ct.

With respect to any discussion of "fairness", all that the Sixth Circuit stated was that Commodities and Lubienski should be allowed to intervene as of right because they "would be unfairly disadvantaged if their land is condemned by the United States before being given the opportunity to assert their interests in this matter." 7 F.3d at 501.

Furthermore, with respect to any argument that the Court should review the necessity of the proposed condemnation, such judicial review is precluded under applicable law. As the Supreme Court held in *United States ex. rel. TVA v. Welch,* 327 U.S. 546, 557, 66 S. Ct. 715, 90 L. Ed. 843 (1946),

> Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, *a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property.*

(Emphasis added.)

To the extent that intervenors rely upon the Sixth Circuit's suggestion at 7 F.3d at 501 that Commodities and Lubienski by intervening to assert their interests in this matter they would be entitled to "a hearing on questions relating to necessity and expediency", *id., citing Bragg v. Weaver,* 251 U.S. 57, 58, 40 S. Ct. 62, 63, 64 L. Ed. 135 (1919), any reliance upon Bragg would be misplaced. In *Bragg,* the Supreme Court held only that the owner of property has a right to be heard on the issue of *just compensation,* but that once the public purpose for the taking is established, the questions of necessity and expediency are for the government to determine, not the courts. *Id.*

A discussion of the "public purpose" of the project follows in the next section of this Opinion and Order.

689, 692, 67 L. Ed. 1186 (1923) ("that a taking of property for a highway is a taking for public use has been universally recognized."); *Luxton v. North River Bridge Co.*, 153 U.S. 525, 530, 14 S. Ct. 891, 892, 38 L. Ed. 808 (1894) (Congress "may, at its discretion use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce.")

The "public purpose" question arises in this case because the MOA contemplates that the Government will take the Intervenors' land by condemnation, and the funding for the Government's acquisition will be provided by the DIBC. Case law demonstrates, however, that the contemplated involvement of the DIBC does not alter the public purpose of the project.

Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), involved condemnations for an urban renewal project in the District of Columbia. The land condemned by the Government was to be transferred to a private developer who would oversee the redevelopment of the area. The aggrieved condemnee in Berman was the owner of a department store that was not a blighted property which was located somewhat beyond the blighted area. He challenged the constitutionality of the taking of his property, arguing as the Intervenors do here, that there was no necessity to take his property to achieve the goals of the project. He also argued that there was no public use involved since his property was to be transferred to another private owner.

Both arguments were rejected by the Supreme Court. With respect to using a private enterprise to accomplish a public purpose the *Berman* court stated:

> We cannot say that public ownership is the sole method of promoting the public purpose ... [this] also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their

properties for redevelopment in harmony with the overall plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose,

348 U.S. at 34, 75 S. Ct. at 103.

The "public purpose/private enterprise" issue was revisited by the Supreme Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984). In *Midkiff*, the condemnees challenged the constitutionality of the Hawaii Land Reform Act of 1967 which provided for redistribution of large blocks of privately owned land by condemnation.

The Ninth Circuit struck down the Act finding it to be "a naked attempt on the part of the state of Hawaii to take private property of A and transfer it to B solely for B's private use and benefit." The Supreme Court disagreed. Quoting on *Berman, supra*, the *Midkiff* court stated:

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine once the public purpose has been established.
>
> * * * * * *
>
> In short, the Court has made clear that it will not substitute its judgment for a legislative judgment as to what constitutes a public use unless the use be palpably with-

out reasonable foundation.

467 U.S. at 240-241, 104 S. Ct. at 2329.

Most recently, the Supreme Court faced the public use/private enterprise involvement issue in *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992). In that case, as in *Berman, Midkiff*, the aggrieved landowners argued that the taking of their property was not for a public use but rather for the benefit of a private owner. The Court once again rejected this argument and unequivocally stated, "[T]he Court will not strike down a condemnation on the basis that it lacks a public use ***so long as the taking is rationally related to a conceivable public purpose.***" __ U.S. at __, 112 S. Ct. at 1404.[10]

For all of the foregoing reasons, the Court finds that Commodities and Lubienski have not established a "likelihood of success on the merits" so as to entitle them to the preliminary injunctive relief they seek.

B. *No Irreparable Harm*

Because Intervenors cannot establish a likelihood of success on the merits, it is unnecessary to discuss the other preliminary injunction elements. Even though it is unnecessary to proceed with a discussion of the remaining requirements, it

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[10]To the extent that Commodities and Lubienski persist in their argument that the stated public purpose of the Bridge project is a sham and a cover-up for the purpose of putting Commodities out of business (to benefit its duty-free shop competitor, Ammex, Inc.), Commodities have come forward with no hard evidence to substantiate their wholly speculative allegations. Moreover, courts have held that in the absence of proof of egregious bad faith or fraud, it is not for the courts to consider broadside allegations that the purported public use to be served is merely a pretense or sham to cover arbitrary action. *See, e.g., United States v. 416.81 Acres of Land*, 514 F2d 627 (7th Cir. 1975).

is clear to the Court that Commodities and Lubienski cannot satisfy them, either.

With respect to the "irreparable harm" requirement, Intervenors appear to rely solely upon the Sixth Circuit's October 1993 Opinion regarding their right to intervene in this action as they argue at page 13 of their Brief that the Court of Appeals has already decided that the condemnation of their property will cause irreparable injury. As explained above, contrary to Intervenors' assertions, the appellate court did *not* decide the merits of Intervenors' request for injunctive relief. Rather, the Court merely questioned Commodities' and Lubienski's ability to protect their interest absent intervention in the action.

[5] Moreover, it is well-established that injunctive relief is not available to bar a taking of private property for public use *because compensation (i.e., payment of fair market value) is available. See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S. Ct. 2862, 2879, 81 L. Ed. 2d 815 (1984); *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 879 F2d 316, 326 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003, 110 S. Ct. 1295, 108 L.Ed. 2d 473 (1990).

3. *Harm to Others*

The third element which must be satisfied in order to obtain preliminary injunctive relief is establishing that if the injunction were to issue, it would not cause substantial harm to others. *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294 (6th Cir. 1991), *cert. denied*, __U.S.__, 112 S. Ct. 2941, 119 L. Ed. 2d 565 (1992).

It is unquestionable that the Government, DIBC, and the public at-large would be substantially harmed if the Court were to grant the injunctive relief requested by Intervenors. Already millions of dollars have been expended by the Government and DIBC, including millions of dollars of

taxpayer money, which would be "wasted". Moreover, to block the condemnation of the small portion of Commodities property at issue here would further delay what has already become a long-delayed project.

4. *Public Interest*

Intervenors' only argument that the public interest would be advanced by the issuance of the injunction they seek is that "duty-free monopoly is not in the best interests of the public", and the injunction they want would keep them in business and avoid such a monopoly. As indicated above in this Opinion and Order, however, the Government has represented that it only intends to condemn, in fee, a small portion of Commodities Export's parking lot and take an easement over the parking lot for ingress and egress to adjoining property. It is *not* going to put Commodities out-of-business so as to create a "duty-free monopoly".

[6] Furthermore, *Berman* and its progeny establish that when Congress has authorized a taking, it has already determined the public interest and courts are not to second guess that determination. As the Supreme Court stated in *Berman*, "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." 348 U.S. at 32, 75 S. Ct. at 102.[11]

CONCLUSION

For all of the foregoing reasons, the Court finds that Intervenors Commodities Export Company and Walter H. Lubienski have failed to satisfy the requirements for preliminary injunctive relief to preclude the Government from going

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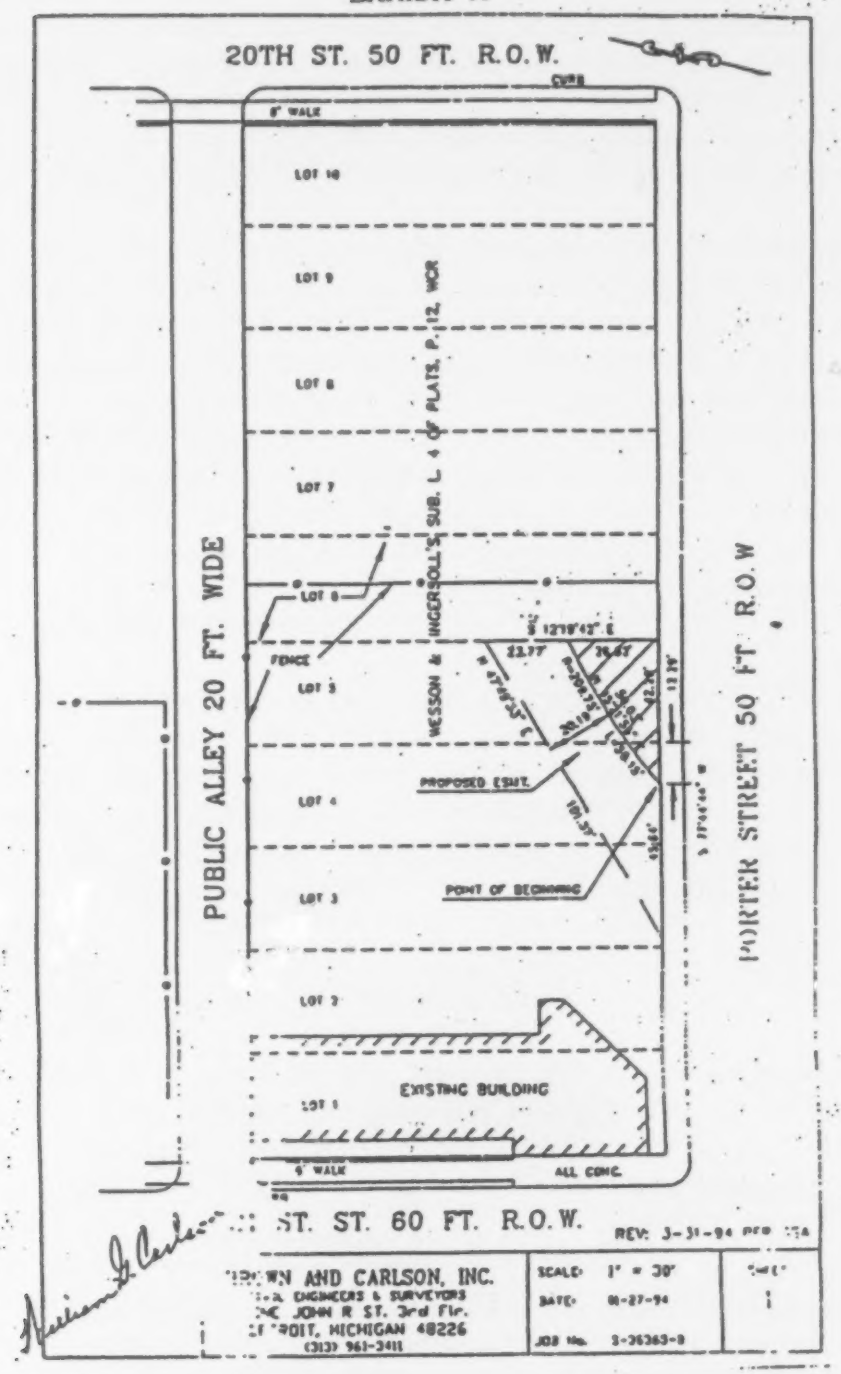
[11]Moreover, it can hardly be said that a greater public interest would be served by maintaining a duty-free store than by the construction of a safe and efficient Federal inspection facility at the heavily trafficked Ambassador Bridge.

forward with the condemnation of the Intervenors' property. Accordingly,

IT IS HEREBY ORDERED that Intervenors Commodities Export Company and Walter Lubienski's Motion for Preliminary Injunction be, and hereby is, DENIED.

EXHIBIT A



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No. 92-1687

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

Walter H. Lubienski and Commodities
Export Company, Proposed
Intervenors-Appellants.

Filed: November 3, 1993
LEONARD GREEN, Clerk

ORDER

BEFORE: MERRITT, Chief Judge; KEITH and SUHR-HEINRICH, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellee,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

No. 95-1118

UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V

CERTAIN LAND SITUATED IN THE CITY
OF DETROIT, WAYNE COUNTY, MICHIGAN;
NASH P. SOGOIAN;
AND TREASURER, CITY OF DETROIT,
Defendants,

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

COMMODITIES EXPORT COMPANY,
a Michigan Corporation;
WALTER H. LUBIENSKI,
Intervenors-Appellants.

Filed: March 7, 1996
LEONARD GREEN, Clerk

ORDER

BEFORE: KRUPANSKY, BOGGS, and NORRIS, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

No. 95-1118

UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V

CERTAIN LAND SITUATED IN THE CITY
OF DETROIT, WAYNE COUNTY, MICHIGAN;
NASH P. SOGOIAN;
AND TREASURER, CITY OF DETROIT,
Defendants,

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

COMMODITIES EXPORT COMPANY,
a Michigan Corporation;
WALTER H. LUBIENSKI,
Intervenors-Appellants.

Filed: April 2, 1996
LEONARD GREEN, Clerk

ORDER

BEFORE: KRUPANSKY, BOGGS, and NORRIS, Circuit Judges

Upon consideration of the appellant's motion to stay the mandate in the above-styled appeal and the appellee's response in opposition thereto,

It is **ORDERED** that the motion be, and it hereby is, GRANTED. The mandate is stayed until 4/19/96.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

No. 95-1118

UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

V

CERTAIN LAND SITUATED IN THE CITY
OF DETROIT, WAYNE COUNTY, MICHIGAN;
NASH P. SOGOIAN;
AND TREASURER, CITY OF DETROIT,
Defendants,

DETROIT INTERNATIONAL BRIDGE COMPANY,
Defendant-Appellee,

COMMODITIES EXPORT COMPANY,
a Michigan Corporation;
WALTER H. LUBIENSKI,
Intervenors-Appellants.

Filed: April 22, 1996

MANDATE

Pursuant to the court's disposition that was filed 1/23/96 the mandate for this case issues today.

Costs: None

A True Copy
Attest: Deputy Clerk

Filing Fee . . $
Printing . . . $
Total . . . . . $

GSA-DIBC

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("Agreement") is made between the United States of America, acting by and through the General Services Administration ("GSA"); and the Detroit International Bridge Company ("DIBC"), and its successors and assigns, and is made to set forth certain principles to be applied in resolving an eminent domain lawsuit now pending between the parties hereto, United States of America v. Certain Land Situated in the City of Detroit, et. al., Civil No. 79-73934, United States District Court, Eastern District of Michigan. This Agreement envisions, is intended to lead to, and shall be part of the consideration for settlement of the lawsuit by a stipulation and further agreements of the parties incorporating the principles set forth herein.

Whereas, both parties agree that the present Federal facility should be expanded to facilitate the flow of vehicular traffic across the Ambassador Bridge ("Bridge") and the clearance of such traffic by agencies of the Federal Government; and

Whereas, GSA has obtained prospectus approval from the Congress, authorizing expansion of Federal clearance facilities in the vicinity of the Bridge; and

Whereas, both parties acknowledge that the City of Detroit has particular interests in certain provisions hereof and its comments shall be sought on this Agreement; and

Whereas, to enhance the functioning of facilities utilized by the Federal Government in the performance of its duties and to enhance the flow and safety of traffic from the Bridge, DIBC agrees to make certain contributions of funds as herein provided.

NOW, THEREFORE, it is agreed as follows:

SECTION I - DEFINITIONS

For purpose of this Agreement, the following terms are defined:

(1.1) The "GSA Site" means an area for an expanded Federal clearance facility that is generally bounded by Porter Street on the north, 20th Street on the east, Fort Street on the south, and the general vicinity of the Bridge span and Bridge plaza on the west, including the Overland Site as defined in paragraph (1.3).

(1.2) The "Expanded GSA Site" means an area including the GSA Site and additional land to the north and east of the GSA Site as set forth on the Approved Plan. Acquisition by GSA of the Expanded GSA Site represents the extent of GSA's land acquisition under the terms of this Agreement. It is the intention of the parties that future modification(s) of Federally-owned clearance facilities shall occur within the boundaries of the Expanded GSA Site.

(1.3) The "Overland Site" is the property which is the subject of the existing litigation between the United States of America and DIBC. This property is generally described as being south of Porter Street, north of Howard Street, west of 20th Street and east of 21st Street, excluding four lots in the northeast corner of the block. The former Sogoian parcel is specifically excluded from any settlement but for other purposes may be considered in this Agreement as being part of the Overland Site.

(1.4) "Federal clearance" for commercial vehicular traffic currently consists of distinct primary and secondary inspection activities at separate locations, but is subject to change as the requirements of the Federal Government may change. Federal agencies planning to be involved in the Federal clearance of commercial vehicular traffic are: Department of Agriculture - Animal and Plant Health Inspection Service

("APHIS"), Department of Health and Human Services - Food and Drug Administration ("FDA"), Immigration and Naturalization Service ("INS"), and Department of Treasury - Customs Service ("Customs").

(1.4.1) APHIS shall mean the Federal agency concerned with the control and regulation of the importation of animals, animal products and byproducts, plants, as well as plant products and byproducts.

(1.4.2) FDA shall mean the Federal agency concerned with the control and regulation of the importation of processed foods, drugs and cosmetics.

(1.4.3) INS shall mean the Federal agency concerned with the documentation of persons entering into and out of the United States; INS may at times perform certain functions of Customs, and it also protects the borders of the United States from undocumented persons.

(1.4.4) Customs shall mean the Federal agency concerned with control and regulation of all import and export of merchandise, and is also concerned with possession and introduction of prohibited items into the commerce of the United States. Customs may at times perform certain functions of INS.

(1.5) "Supplemental Environmental Impact Statement" refers to the overall planning and public hearing process to be conducted by GSA regarding the acquisition of the Expanded GSA Site and implementation of the Approved Plan.

(1.6) "GSA" shall be defined to mean the General Services Administration of the United States of America. GSA is the agency responsible for management of Federal property.

(1.7) "DIBC" shall be defined to mean the Detroit International Bridge Company, its successors and assigns.

(1.8) "City" shall be defined to mean the City of Detroit and/or any municipal agency of the City of Detroit.

(1.9) "Approved Plan" shall be defined to mean the plan to be developed by GSA, and acceptable to DIBC under the terms and conditions of this Agreement. The Approved Plan shall incorporate land within the Expanded GSA Site and provide for an enlarged Federal clearance facility.

(1.10) "Customs Brokers" shall be defined as persons licensed to transact customs business on behalf of others as defined in 19 CFR Part 111.

(1.11) "Federal Building" shall mean the buildings to be erected and developed by GSA pursuant to the Approved Plan for use of the Federal Government, Customs Brokers, and other parties as may occupy said premises with the permission of GSA.

(1.12) "Federal Project" shall mean the currently-proposed expansion of Federal facilities on the GSA Site (as set forth in the "Request For Proposal (RFP)" GS-05P-90-GBC-0141, inclusive of amendments, 1 through 8).

SECTION II - JUST COMPENSATION

(2.1) GSA shall pay to DIBC and DIBC agrees to accept in full settlement the payment of $412,000.00 as just compensation for the taking of the Overland Site, which is a sum of money equal to the difference between the original dollar deposit ($828,000.00) for the taking of the DIBC property which is the subject of the existing litigation (herein referred to as the "Overland Site") and DIBC's purchase price of $1,240,000.00 for the Overland Site. This payment shall be made not later than May 15, 1991, pursuant to a stipulation to be filed in the United States District Court for the Eastern District of Michigan.

SECTION III - VACATION AND USE OF RIGHTS-OF-WAY

(3.1) GSA consented to and joined DIBC in its request, subsequently approved by the City, to vacate that portion of 21st Street from Porter to Howard Streets. In addition, each party hereto agrees to consent in the implementation of the Approved Plan to other street and alley vacations sought by the other party to this Agreement to implement the Approved Plan; provided access is reserved or otherwise assured for the property of each party.

(3.2) In anticipation of the execution of this Agreement and in good faith, GSA provided necessary consents and license to DIBC to accommodate DIBC's agreement, at its sole expense, to expand the present truck parking area on the Overland Site to the DIBC Building, generally from Porter Street to the intersection of 21st Street and Howard Street. Said consents and license are set forth in the Revocable License for Non-Federal Use of Real Property and the "Agreement" attached thereto, both dated October 15, 1987, by and between GSA and DIBC, both of which are hereby incorporated by reference as if fully set forth herein.

SECTION IV - APPROVED PLAN DEVELOPMENT

(4.1) GSA agrees to embark upon the development of an Approved Plan acceptable to DIBC in an effort to complete contract documents suitable for construction pricing by May 31, 1991. Both parties seek a design which will allow flexibility of expansion, assure effective and efficient conduct of Federal functions, promote timely development and use of Federal clearance facilities by a target date of August 1992, and which will inure to the benefit of the City and the public at large. It is agreed that the design development of this plan will:

(4.1.1) allow provisions for structural support of a new

bridge span within the primary inspection lanes area generally between the existing 21st Street right-of-way and the existing Bridge span between Porter and Fort Streets;

(4.1.2) provide for the further improvement of the entry ramp radius and geometrics, by the inclusion of additional land, if in the development of the Approved Plan it is determined that said acquisition will provide for safer and more desirable entry ramp and facilities; and

(4.1.3) demonstrate the capability to allow future incorporation under one or more alternatives of inspection facility expansion and flexibility within the Expanded GSA Site.

(4.2) In the course of the implementation of this Agreement there may be one or more Approved Plans, developed by GSA and acceptable to DIBC, to implement the provisions of various sections of this Agreement.

SECTION V - CONSTRUCTION OF RAMPS AND APPROACHES

(5.1) The location and number of lanes in the entry ramp(s) and primary inspection approaches ("stacking lanes") shall be set forth in the Approved Plan. Upon request by GSA, DIBC shall timely grant at no cost to GSA all licenses necessary for GSA contractors to enter upon DIBC property, including the Bridge plaza, to construct or demolish at GSA's sole expense improvements consistent with the Approved Plan. Such work may include construction of new ramps and approaches, demolition of existing inspection booths, placement of traffic control barriers, acoustical materials or other devices necessary to regulate and secure traffic flow into the new Federal facility, and development of landscaping. DIBC shall have the right to review and approve the design and construction of all work to occur on DIBC property; such right shall be exercised reasonably.

(5.2) DIBC shall be responsible for the maintenance and repair of any improvements, except acoustical materials provided for in the Federal Project and landscaping, on property owned by DIBC. Said maintenance and repair shall be accomplished in a manner consistent with the Approved Plan. GSA shall be responsible for the maintenance and repair of said acoustical materials and landscaping. DIBC shall grant GSA perpetual access and maintenance easements sufficient to allow GSA to maintain and repair the acoustical materials and landscaping. Notwithstanding any other provision of this Agreement, said easements shall terminate in the event the GSA Site or the Expanded GSA Site ceases to be used as a border inspection facility for the Bridge.

(5.3) DIBC shall grant GSA a perpetual easement to permit the movement of vehicles and individuals from the Bridge plaza to the Expanded GSA Site. Said easement may incorporate DIBC's property interest in the former 21st Street right-of-way, between Porter Street and Howard Street, and the right of Federal employees to use stairways and walkways as a means of access to and from the Bridge plaza and the Expanded GSA Site as long as these facilities are retained by DIBC. It is understood that such stairways and walkways may be reasonably relocated from time to time, and that DIBC shall be under no obligation to retain said stairwells and walkways. Notwithstanding any other provision of this Agreement, said easement shall terminate in the event the GSA Site or the Expanded GSA Site ceases to be used as a border inspection facility for the Bridge.

SECTION VI - PERMANENT RELOCATION AND EXPANSION OF CARGO INSPECTION FACILITIES AND RELATED PROPERTY USE

(6.1) GSA has been authorized to acquire the property defined as the GSA Site. GSA shall act promptly to acquire and develop the Expanded GSA Site subject to compliance with applicable laws. In furtherance thereof, GSA and DIBC

agree as follows:

(6.1.1) GSA agrees to cause to be developed on the Expanded GSA Site new Federal clearance facilities in accordance with this Agreement and the Approved Plan.

(6.1.2) DIBC agrees to convey and warrant to GSA, by execution pursuant to GSA Form 1226 ("Contract To Sell Real Property"), all DIBC rights, title and interest in:

(6.1.2.1) Two (2) lots owned by DIBC north of the Overland Site (Lots 89 and 93 of Private Claim 729), for the total consideration of $14,235.00. Execution of GSA Form 1226 shall occur prior to May 15, 1991. DIBC agrees to use its best efforts to assist GSA personnel and its title agent in a timely closing on these properties; and

(6.1.2.2) The lots owned by DIBC south of Porter Street, west of the north-south alley between 20th Street and St. Anne Street, north of Fort Street and east of 20th Street in consideration of this Agreement. Execution of GSA Form 1226 shall occur prior to may 15, 1991. Acceptance by GSA of the executed GSA Form 1226('s) shall be subject to the findings of the Supplemental Environmental Impact Statement.

(6.1.2.3) It is understood that DIBC may not have title to all the above properties acceptable to the Attorney General. In such event it is understood that GSA will cause to be obtained necessary title clearance to said properties.

(6.1.3) DIBC agrees to compensate GSA and make GSA "whole" for all Incremental Costs incident to and arising out of revisions to the proposed Federal Project as follows:

(6.1.3.1) Costs related to the completion of a Supplemental Environmental Impact Statement necessary to

implement the Approved Plan on the Expanded GSA Site.

(6.1.3.2) Costs for the acquisition of the Expanded GSA Site, which costs shall be defined as all costs incurred by the Federal Government in obtaining unencumbered fee-simple title in the Expanded GSA Site, excluding the area of the GSA Site. Said title shall be subject to the approval of the Attorney General. Such costs shall include, but not be limited to, site acquisition costs (whether by voluntary conveyance or by eminent domain, including all settlement and interest costs paid by the Federal Government), site appraisal costs, title evidence costs, site survey costs, and the cost of relocation services as provided for under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (P.L. 91-646), for affected individuals, businesses and utilities.

(6.1.3.3) All contractual design and construction costs resulting from requests by DIBC for modifications to the Federal Project.

(6.1.3.4) The amount of said costs shall be developed by GSA and its consultants in consultation with DIBC. GSA agrees to consult with DIBC, to the extent allowed by Federal law, relative to experts to be retained, and prior to agreeing to pay any Incremental Costs in excess of professional estimates of said costs prepared by said experts. Further, the above costs shall not include any charges or expenses for services of Federal employees.

(6.1.4) DIBC shall submit an irrevocable letter of credit, or other financing vehicle, acceptable to GSA to secure payment of such costs by DIBC. DIBC shall be allowed to adjust the amount of the letter of credit from time to time; provided, that at all times the amount of the letter of credit shall be at least equal to GSA and DIBC's mutual good

faith estimate of the Incremental Costs for which DIBC has not compensated GSA in cash as set forth below. Requests for payment of Incremental Costs, together with appropriate supporting documentation, shall be forwarded by GSA to DIBC; provided, that said requests shall include only obligations for services and materials to be furnished and/or installed pursuant to the Approved Plan, which obligations are scheduled to occur not more than thirty (30) days from the date of the request. If any irregularities with respect to any such requests are noted by DIBC, DIBC shall promptly notify GSA. DIBC shall deposit, or cause to be deposited, to an escrow or Treasury account as directed by GSA, sufficient funds to cover the invoices within ten (10) days of DIBC's receipt of said invoices. Payment shall not constitute a waiver of any noted irregularity which shall then become the subject of future negotiations between GSA and DIBC. It is the intent of the parties that funds shall be deposited in sufficient time to provide for funds certification to a GSA Contracting Officer prior to the necessary obligation of such funds as required by law, and allow payment by the Federal Government of invoices rendered for services and materials furnished pursuant to each request for payment in accordance with customary Federal procedures. Funds remaining in the escrow or Treasury account at the conclusion of all project related work shall be returned to DIBC within sixty (60) days.

(6.1.5) DIBC's compensation obligation shall continue until the Federal Government has: acquired fee simple title to the Expanded GSA Site whether said title is acquired through voluntary conveyances, or through stipulations for settlement or final judgements, including appeals therefrom, of all eminent domain proceedings for such acquisitions, including all relocation assistance; and completed construction and all construction contracts, including any and all claims and appeals arising therefrom, pursuant to the Approved Plan. Further, except to the extent that the Federal Government is expressly responsible for the actions

of Federal employees under this Agreement, DIBC shall hold harmless and indemnify the Federal Government for any claims, costs, and expenses, contractual or otherwise, that may arise out of the acquisition of the Expanded GSA Site, excluding the GSA Site, and the implementation of the Approved Plan. Such claims, costs, and expenses shall include, but not be limited to, change order claims, equitable adjustments, liability actions, other construction disputes, land acquisition costs and relocation expenses, as well as any other expenses incurred by the Federal Government in implementing the Approved Plan.

(6.1.6) The parties recognize that their mutually agreed upon estimate of Incremental Costs could, for any number of unforeseeable reasons, be lower than the actual amount of Incremental Costs incurred by GSA. In the event that the actual amount of Incremental Costs exceeds the amount secured by DIBC's irrevocable letter of credit, GSA shall provide DIBC with written notice of that amount. If it is subsequently determined by mutual agreement of the parties hereto or by an order of a court of competent jurisdiction that DIBC is obligated to pay that amount to GSA and DIBC fails to pay that amount within thirty (30) days after such determination or after the expiration of all periods of appeal from any such court order, DIBC shall be deemed to have forfeited all rights, privileges, and property interests conferred upon DIBC or to which DIBC is entitled under the terms of this Agreement.

(6.2) In the event that GSA acquires the Expanded GSA Site, GSA further agrees that if the Expanded GSA Site thereafter ceases to be used for any border inspection purpose, DIBC has requested the right to acquire all properties in the Expanded GSA Site subject to the following conditions:

(6.2.1) No reverter clause shall be made a condition of the conveyance of title acquired by GSA within the

Expanded GSA Site.

(6.2.2) GSA shall return the area within the Expanded GSA Site (excluding the GSA Site) to DIBC without cost except for the then current fair-market value of any improvements that the Federal Government has placed thereon.

(6.2.3) This right of DIBC, its successors and assigns, to acquire said property shall expire December 31, 2021, or upon circumstances in which the Bridge ceases to be used as an international border crossing, whichever occurs first.

(6.2.4) Consideration due to the Federal Government upon DIBC acquisition of the GSA Site shall be based upon the Federal Government's then current fair market value estimate of the property value as if unencumbered by the above right of DIBC to acquire said property.

(6.2.5) This right of acquisition shall be subject to Congressional approval, in order to comply with the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, specifically 40 U.S.C. 484, and the regulations of the Attorney General issued for the purpose of approving title to lands.

(6.3) It is understood that in the design of inspection facilities, Federal policy requires that, subject to the affected Federal agencies exclusive control, vehicles entering or leaving the inspection area shall have the opportunity to enter directly from or onto public rights-of-way. In the event GSA acquires the Expanded GSA Site, GSA agrees that GSA will allow the free flow of vehicles, after Federal inspection, or prior to such inspection as approved by the affected Federal agencies, from the Expanded GSA Site onto DIBC property as well as whatever further flow, if any, which the affected Federal agencies may authorize pursuant to any agreement with DIBC or otherwise may from time to time permit.

DIBC agrees that if it desires egress from Expanded GSA Site directly onto DIBC property that it will provide public right-of-way across DIBC owned land, if necessary, in order to comply with said Federal requirement, reserving the capacity and right to reasonably change or relocate such right-of-way, subject to reasonable consent and approval of GSA. GSA shall respond to DIBC within sixty (60) days of receipt by GSA of written notice of the intention of DIBC to develop or relocate such right-of-way. The right to exercise the development or relocation of said right-of-way shall expire December 31, 2021.

(6.4) The parties agree to the following principles regarding the provision of space for Customs Brokers:

(6.4.1) If DIBC delivers a written request to GSA on or before October 19, 1991, GSA shall license DIBC to develop, maintain and manage approximately 10,000 gross square feet of space within the Federal Building (at a location agreeable to both parties) adequate and suitable to be utilized by Customs Brokers, and related uses acceptable to the affected Federal agencies, operating in conjunction with Federal clearance functions at this border crossing; provided, that:

(6.4.1.1) Such space is made equitably and openly available for occupancy to all interested sub-licensees on reasonable terms and conditions. DIBC shall provide GSA copies of all DIBC agreements executed with sub-licensees regarding the use of Federal property for GSA's review and approval; such approval is not to be unreasonably withheld; DIBC shall submit to GSA its form agreement for the use of said space. Approval of the form agreement by GSA shall constitute satisfactory compliance by DIBC with the provisions of this Agreement. Approval of the form agreement shall not be unreasonably withheld. DIBC shall obtain GSA's written approval prior to deviating from the terms of the ap-

proved form agreement. Copies of all executed form agreements shall be furnished to GSA within fifteen (15) days of their execution.

(6.4.1.2) Use of said space as it relates to Federal clearance functions may not conflict with Federal security requirements as stated by agencies of the Federal Government; and,

(6.4.1.3) In the event GSA revokes this license before December 31, 2021, DIBC shall be reimbursed (except as noted in paragraph 6.4.1.4.1) its unamortized costs, plus interest thereon at the Federal declaration of taking interest rate as provided by the Declaration of Taking Act, as amended (40 U.S.C. 258e-1), from the date of expenditure by DIBC until the date of payment by GSA for the modification of this space. GSA shall assume DIBC's rights and obligations with regard to all sub-licensees occupying said space.

(6.4.1.4) GSA may revoke said license only due to a:

(6.4.1.4.1) breach by DIBC of its obligations to GSA as contained in the license agreement and failure by DIBC to cure said breach within ninety (90) days of written notice of said breach delivered to DIBC, provided that if said cure reasonably requires more than ninety (90) days then said time period to cure the default shall be extended accordingly. GSA shall not reimburse DIBC for any costs incurred by DIBC for the development, maintenance and management of this space in the event said license is revoked due to a breach by DIBC of its obligations to GSA;

(6.4.1.4.2) determination that the Federal Government is required by Federal regulation, or Customs national policy covering the northern border, to serve the function of sub-letting or sub-licensing said space;

or

(6.4.1.4.3) need to assign said space to a Federal agency involved in Federal clearance operations. In the event GSA requires space for use by a Federal agency, GSA will cooperate with DIBC to make other space conveniently available.

(6.4.2) Said space shall be provided by GSA to DIBC in the manner set forth in the Federal Project. DIBC shall, at its sole expense, be responsible for all further work to be completed within this space. All work shall be completed in accordance with all applicable GSA fire and life-safety standards and requirements. GSA shall have the right to review and approve the design and construction of all work to occur within this space prior to the occupancy of this space by sub-licensees; such approval is not to be unreasonably withheld. DIBC agrees to hold the stated interest in this space, and actively market for sub-license such space, until December 31, 2021. Consideration to be paid by DIBC to GSA for this space shall be based on seven (7) percent of DIBC's gross income from this space. It is understood that in the sub-license and use of such space that a fair rental shall be charged for use thereof, and that said space shall be provided to sub-licensees in an equitable manner. DIBC shall be responsible for all costs associated with the operation of this space. GSA shall not cause or permit to be constructed or developed on the Expanded GSA Site any facilities for the use of Customs Brokers other than the stated 10,000 gross square feet. DIBC, after being granted said space, may relieve itself of the obligation to operate and maintain Customs Brokers' space at any time after December 31, 1999, by providing one-hundred eighty (180) days written notice to GSA. Within one-hundred eighty (180) days after delivery of such written notice, said space shall be surrendered by DIBC to GSA to be developed, used and maintained as GSA sees fit.

(6.5) GSA shall permit DIBC to install, maintain and operate, at the sole cost of DIBC, signage, electronic communications and data transmissions to provide information and services to vehicles and operators in order to facilitate the effective use of the entry ramp(s) and primary inspection approaches ("stacking lanes") as displayed on the Approved Plan. Such permission shall be granted provided said communications do not interfere, impede or otherwise affect Federal clearance functions within the Expanded GSA Site, and provided further that affected Federal agencies shall have the power to reasonably determine actions that may constitute interference with Federal clearance functions within the Expanded GSA Site. Said determination may not be arbitrary, capricious or unreasonable. A license shall be provided to DIBC by GSA not later than August 1, 1991, to permit installation and maintenance by DIBC of said communication systems. Said license shall be renewable or continue until December 31, 2021. DIBC shall in the operation of said communications systems include traffic directions, and Federal clearance instructions as affected Federal agencies may from time to time reasonably request; provided, that DIBC shall not be obligated to install, maintain or operate said devices and/or systems solely for the use and benef it of the Federal Government.

(6.6) DIBC shall be granted from the Expanded GSA Site air rights including appropriate rights of support and entry for construction and maintenance (at DIBC cost), if it shall so elect, of additional lanes on the east side of the Bridge to facilitate "straightening" of Bridge traffic lanes and to increase lane capacity on the Bridge from approximately the intersection of Porter Street and 21st Street extended southerly to the Bridge anchorage just north of Jefferson Avenue; provided, that if DIBC fails to construct said addition on or before December 31, 2021, then said property interest shall terminate.

(6.6.1) GSA shall have the right of reasonable review

and approval of the placement, of all structural supports, footings, foundations, and related elements of such extensions of the Bridge deck; the design of the supports may be considered in reviewing and approving placement of said supports. The placement of such structural supports, footings, foundations, and related elements of such extensions of the Bridge deck shall be pursuant to the Approved Plan.

(6.6.2) Nothing herein shall be construed to make the Federal Government responsible or accountable for the structural integrity and safety of such Bridge deck extensions.

(6.6.3) In addition, DIBC shall be granted a construction and maintenance easement to enter upon, with scaffolding, trucks, cranes and other mechanized equipment as well as workmen, such property beneath the Bridge and adjacent area as may be necessary for the construction, maintenance and improvement of the Bridge span as presently constructed or as it may be expanded as above provided. Exercise of said easement for construction and maintenance, except in the event of emergency, shall be subject to a forty-five (45) day written notice given to GSA and shall be conducted in a manner reasonably intended to minimize inconvenience to Federal clearance functions. Said easement shall terminate in the event the physical structure of the Bridge shall cease to exist, and no reasonable steps are commenced for its reconstruction within two (2) years.

(6.7) Upon approval by the parties of an Approved Plan, including the Expanded GSA Site, DIBC shall provide a buffer area, bounded by the alley between 20th Street and St. Anne Street on the west, Porter Street on the north, St. Anne Street on the east, and Fort Street on the south, in a manner required to satisfy environmental and historical preservation requirements. Notwithstanding this obligation DIBC may at

its cost contest the reasonableness and necessity of said requirements.

SECTION VII - EXPANDED GSA SITE AND APPROVED PLAN

(7.1) A redesign of the Federal facility shall be undertaken if the terms of the following Inspection Facility Expansion Criteria are met:

(7.1.1) At such time that the planned six (6) primary inspection booths no longer can accommodate the commercial vehicle traffic at this border crossing, GSA shall timely expand, at the sole expense of GSA, the number of primary inspection booths, subject to the required Congressional approvals. The number and location of these additional booths shall be determined in consultation with the affected Federal agencies and DIBC. Such expansion shall occur when primary inspection delays of over fifteen (15) minutes occur more than twenty (20) percent of the time for a period of at least six (6) months when at least eighty (80) percent of the planned inspection booths are staffed; or in the event such staffing is less than eighty (80) percent, when reasonable professional analysis demonstrates that such delays would occur on an equally sustained basis even if such staffing were in effect. Notwithstanding the above provision, it is hereby expressly acknowledged and accepted by GSA and DIBC that customary approval procedures for such GSA expansion projects are dependent upon the consent and agreement of affected Federal agencies, such as APHIS, FDA, INS and Customs. In the development of the above expansion project proposal, GSA shall affirmatively solicit and encourage such consent and agreement by the user agencies. GSA's affirmative agreement to undertake expansion as provided herein for purposes of this Agreement shall not be deemed as prior consent by or approval of the project or of the expansion or delay criteria set forth herein by any other Federal

agency. Further, it is hereby acknowledged that the decision regarding the appropriate staffing of the facilities within Expanded GSA Site is at the sole discretion of the affected Federal agency.

The above criterion providing for expansion of said facilities solely is intended to provide an objective standard for expansion of primary inspection booths and is intended to apply to said Federal project, the Approved Plan and the Expanded GSA Site, and to be in force and effect until December 31, 2021; or,

(7.1.2) DIBC may cause relocation of the planned six (6) primary inspection booths as well as any additional booths to the easterly side of the Expanded GSA Site, pursuant to the development of a satisfactory design and implementation plan acceptable to GSA and DIBC (the Approved Plan). All Incremental Costs related to such redesign and relocation shall in that event be the obligation of DIBC in the same manner as otherwise provided in this Agreement. The right to exercise this relocation option shall expire on December 31, 2021. Upon relocation of the original planned or developed primary inspection booths, the resultant traffic flow will bypass the area generally located between Porter Street on the north, Fort Street on the south, the GSA facility on the east, and DIBC property on the west as set forth on the Approved Plan. Said area shall be conveyed by GSA to DIBC upon completion of the Approved Plan in exchange for prior considerations provided by DIBC to GSA under this Agreement, to facilitate the construction and maintenance of additional traffic lanes for the Bridge. Subject to the needs of DIBC for Bridge expansion or maintenance thereof, it is further understood between the parties that GSA shall retain or receive title to property for parking or other uses reasonably required by GSA, if said relocation of inspection booths occurs after development by GSA of the originally planned inspection booths as set forth in the Approved

Plan.

In the event DIBC elects to cause the above relocation prior to completion of the development of the Federal project:

(7.1.2.1) DIBC shall provide reasonable assurances to GSA's architect/engineer to advance design of the Approved Plan.

(7.1.2.2) As a result of conveying land to DIBC as provided above and subject to the needs of DIBC for bridge expansion or maintenance thereof, it is further understood between the parties that GSA shall retain or receive title to property to replace parking or other uses which are lost to GSA as a result of the Approved Plan.

(7.1.2.3) GSA shall design and construct the facility detailed on the Approved Plan in an expeditious manner, consistent with this Agreement.

SECTION VIII - GENERAL PROVISIONS

(8.1) All rights and obligations of the parties as herein provided in this Agreement shall be conditioned upon the physical existence and use of the Bridge as a bridge as of the date of exercise of such rights or obligations. Said rights and obligations shall terminate in the event the physical structure of the Bridge shall cease to exist, and no reasonable steps are commenced for its reconstruction within two (2) years. The rights and obligations shall include all licenses, easements and rights-of-way as provided or established hereunder. Further the parties agree to negotiate in good faith based upon then existing circumstances, extensions of all such rights, obligations, licenses, easements and rights-of-way that expire on December 31, 2021.

(8.2) Additional costs of contractors in the implementation

of the Approved Plan shall be reduced wherever possible. GSA agrees wherever possible to issue construction modifications to prevent waste in the development consistent with the Approved Plan. The parties shall seek to accelerate and/or delay components of the project to reduce costs of the Approved Plan. It is understood in the implementation of the above that GSA has let a contract for the development of the Federal Project, but agrees in said process to modify such contract and exercise options therein in a manner intended to reduce costs of constructing the Approved Plan. In the administration of development of the Approved Plan, including acquisition of the Expanded GSA Site, the obligation of DIBC for compensation to GSA of Incremental Costs for services shall not exceed the price which is determined to be fair and reasonable pursuant to applicable Federal procurement regulations. GSA shall treat funds provided by DIBC as if such funds were Federal funds.

(8.3) It is intended by the parties that this lawsuit, Civil No. 79-73934, be settled by the payment of just compensation in the amount agreed to in this Agreement and in the Stipulation of Settlement which will be drafted based on this Agreement; and it is agreed that the issue of just compensation may not be reopened based on any alleged breach of the Stipulation of Settlement. It is further agreed that DIBC waives any further claims it may have for attorney fees, costs, or damages arising from this lawsuit and any alleged breach of this Agreement or the Stipulation of Settlement. However, the parties agree that they shall have the right to apply to the United States District Court for the Eastern District of Michigan for enforcement of this Agreement or of the Stipulation of Settlement. But it is understood and agreed that such application for relief shall constitute an entirely independent and separate cause of action from this lawsuit. It is intended by the parties that Civil Action 79-73934 be entirely concluded by the entry of final judgment and may not be reopened based on any alleged breach of this Agreement or Stipulation of Settlement, and shall not in any way

change or modify the amount agreed upon as just compensation.

(8.4) It is understood by the parties that all agreements between GSA and DIBC as consideration for settlement of this litigation are subject to the review of the Attorney General and although settlement by utilizing said Agreement will be recommended, entry of a stipulation cannot be guaranteed. It is further understood that DIBC shall not be bound by this Agreement until and unless GSA is so bound. GSA agrees to negotiate in good faith with DIBC to achieve satisfactory compliance with or overcome any legal objections that the Attorney General may have to this Agreement.

(8.5) The following remedies shall apply in the event the following-described events occur:

(8.5.1) In the event, prior to any expenditure of funds by DIBC under the terms and conditions of this Agreement or the granting of any easements, licenses, rights-of-way or other interests in property by either GSA or DIBC pursuant to the terms of this Agreement, GSA and DIBC are unable to comply with the terms and conditions of this Agreement due to the actions of any third-party which realistically prohibit GSA or DIBC from proceeding with this Agreement, all said terms and conditions shall be rendered null and void. In that event, GSA and DIBC shall negotiate in good faith to attempt to arrive at an amended Agreement.

(8.5.2) In the event the parties cannot agree upon provisions to be included in the Approved Plan, by June 30, 1991, it is agreed that the parties will cooperate in good faith with the chairperson of the Urban Planning Department of Michigan State University or his/her designee serving in the capacity of a mediator in an effort to come to an agreement on the Approved Plan. Fees and expenses of the mediator shall be paid equally by GSA and DIBC. Subject to the above, if GSA and DIBC fail to develop an

Approved Plan satisfactory to both parties by January 1, 1992, the terms and conditions of this Agreement yet to be implemented shall be rendered null and void, unless this Agreement is extended by the mutual consent of both parties. No compensation shall be due by either party to the other, except DIBC's rights stated in paragraph (6.2).

(8.5.3) After the development of an Approved Plan, and the expenditure of any funds by DIBC or the granting of any easements, licenses, rights-of-way or other interests in property by either GSA or DIBC pursuant to the terms and conditions of this Agreement, the terms and conditions of this Agreement shall remain in full force and effect except to the extent that compliance with those terms and conditions is frustrated by an order from a court of competent jurisdiction, the mitigation measures of the Supplemental Environmental Impact Statement, the action or inaction of a legislative body of competent jurisdiction, an act of God, or an event of war, fire, flood, strike or other occurrence of force majeure. The parties further agree to take all reasonable steps to overcome such frustrations.

(8.6) All notices from or to any party as provided herein shall be addressed as follows:

To GSA: Assistant Regional Administrator
Public Buildings Service - 5P
General Services Administration
230 S. Dearborn St.
Chicago, IL 60604

with a copy to:
Carol Domino - 5PM-2D
General Services Administration
477 Michigan Avenue
Detroit, MI 48226;

and

Michael Gelber - 5PL
General Services Administration
230 S. Dearborn St.
Chicago, IL 60604

To DIBC: Detroit International Bridge Company
C/0 Central Cartage Co.
Attention: M.J. Moroun
12225 Stephens Road
Warren, MI 48089

with a copy to:
Gerald A. Rauch
Central Cartage Co.
12225 Stephens Road
Warren, MI 48089

The designated parties or their successors or assigns may give notice of changes in the designated addressees and addresses by delivery to the above address or to the last noticed change thereof.

To be effective all notices provided under this Agreement shall be delivered by the equivalent of certified mail, cite this Agreement, refer to the paragraph under which notice is given, and summarize the consequences as provided under this Agreement or otherwise if the receiving party does not respond to the subject notice.

DETROIT INTERNATIONAL BRIDGE COMPANY

M. J. MOROUN
CHAIRMAN OF THE BOARD

Date: March 28, 1991

GENERAL SERVICES ADMINISTRATION

DONALD L. ZITO
REGIONAL ADMINISTRATOR

Date: May 21, 1991

Supreme Court, U.S.
FILED
JUL 8 1996
CLERK

No. 95-1977

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMMODITIES EXPORT CO.
and WALTER H. LUBIENSKI
Petitioners,

V.

THE UNITED STATES and
DETROIT INTERNATIONAL BRIDGE COMPANY
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT DETROIT INTERNATIONAL BRIDGE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James F. Hibey, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hand
901-15th Street, N.W., Suite 700
Washington, D.C. 20005
(202) 371-6045

Counsel of Record for Respondent
Detroit International Bridge
Company

Dated: July 8, 1996

Corporate Listing

Respondent Detroit International Bridge Company is a wholly owned subsidiary of Centra, Inc.

Detroit International Bridge Company has no nonwholly owned subsidiaries.

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ARGUMENT

PETITIONERS HAVE ADVANCED ABSOLUTELY NO BASIS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The rules of this Court and its precedent make it clear that a Writ of Certiorari will not be granted except for compelling reasons. Rule 10 specifies the considerations which might lead the Court to grant such a writ to review a decision by a Federal appeals court:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; [or]
>
> . . .
>
> (c) a United States court of appeals has decided an

> important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R.10. Petitioners do not even attempt to claim that the writ they seek satisfies one or more of the above requirements -- nor could they. The per curiam decision of the Sixth Circuit Court of Appeals merely affirmed the denial of a preliminary injunction. Both that holding and the ruling of the district court were fact-driven decisions that involved neither a federal question nor any novel legal issue. Petitioners simply failed below in their attempts to gain a preliminary injunction in a condemnation action -- a decision compelled by the district court's finding that petitioners had satisfied none of the four requirements for such an injunction. (See A56-A59)

As is evident from petitioners' failure to argue otherwise, the Sixth Circuit's decision does not conflict with any decision of another court of appeals; does not conflict with a decision by a state court of last resort; and certainly does not depart in the least from the accepted and usual course of judicial proceedings. In sum, there are no federal questions involved; there are no conflicting decisions of other courts; and there is no conflict with any

decision of this Court. There is simply no basis for certiorari.

Recognizing this fact, petitioners attempt in vain to argue the applicability of Local Number 93, International Assoc. of Firefighters v. Cleveland, 478 U.S. 501 (1986). This is a disingenuous and desperate attempt to find some basis to evoke this Court's interest. In fact, Local No. 93 has never once been mentioned by petitioners in any brief in this case prior to the filing of the petition for writ of certiorari in this Court -- and with good reason. That case is wholly inapplicable.[1/]

Notably, petitioners do not actually argue that the decision below conflicts with this Court's decision in Local No. 93. Clearly, such an argument would be frivolous. To the extent Local No. 93 addressed the rights of intervenors, that decision gives petitioners no more rights than they have exercised. Petitioners have already been allowed to intervene and to state their objections to the Memorandum of Agreement ("MOA") at length. Their failure to present testimonial evidence was self-imposed, since they did not request an opportunity to do so until after the hearing held by the district court.

1/ In addition, petitioners are precluded from raising an argument for the first time in this Court. Patrick v. Burget, 486 U.S. 94, 99 n.5 (1988) (Court will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower court); Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam) (same).

In any event, however, the MOA does not impose any duties or obligations upon petitioners -- thus bringing it squarely within the holding of Local No. 93 that an order can be entered without an intervenor's consent. See 478 U.S. at 529-30. Indeed, petitioners apparently fail to comprehend that this Court upheld the decree at issue in Local No. 93.

Among the other problems with petitioners' belated and ill-conceived attempt to apply the decision in Local No. 93 to the case at bar is their failure to appreciate the difference between a consent decree which directly affects the rights of individuals who are not parties to that decree and a decision by the government to exercise its right of eminent domain. Petitioners' argument, if accepted, would allow any landowner or business to prevent the condemnation of its property without its consent. For more than a century, this Court has uniformly rejected similar contentions. See, e.g., National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); United States ex. rel. TVA v. Welch, 327 U.S. 546 (1946); Georgia v. City of Chattanooga, 264 U.S. 472 (1924); Rindge v. County of Los Angeles, 262 U.S. 700 (1923); Bragg v. Weaver, 251 U.S. 57 (1919); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896); Luxton v. North River Bridge Co., 153 U.S. 525 (1894); Shoemaker v. United States, 147 U.S. 282 (1893).

Petitioners' additional arguments require little further consideration. Indeed, the petition's complete lack of merit is amply demonstrated by petitioners' own arguments. For example, petitioners argue that the involvement of respondent Detroit International Bridge Company ("DIBC") in the renovation of the Federal facility at the Ambassador Bridge negates the public purpose of that project. Petition for Certiorari ("Petition") at 26-27. As this Court's previous decisions have made crystal clear, such private involvement does not lessen the public purpose of such a project. See National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

Petitioners even appear to argue that because DIBC owns the Ambassador Bridge, the road across the bridge is not a public roadway but a "private road on a private bridge." See Petition at 27 (emphasis in original). The preposterous suggestion that private ownership strips the Federal project of its public purpose is refuted by the fact that the Bridge is the highest-volume commercial border crossing in the United States and by this Court's long-established recognition that condemnation actions related to public roadways -- regardless of ownership -- have involved "public uses" and "public purposes" "from time immemorial." Rindge v. County of Los Angeles, 262 U.S. 700, 706 (1923); see also Luxton v. North River Bridge Co., 153 U.S. 525 (1894) (improvement of bridge has public purpose).

In short, petitioners' application is devoid of any merit. Nothing more need be said. However, in accordance with this Court's Rule 15(2), respondent is constrained to note that, as it has repeatedly pointed out in the proceedings below, petitioners' statement of the case is replete with inaccuracies. Even if all of those inaccuracies were correct, petitioners would state no legitimate entitlement to a writ of certiorari. Nevertheless, the inaccuracies should not go unremarked. Among the many false and misleading characterizations made by petitioners are the following:

- "DIBCO . . . [has] a strong vested interest in eliminating Commodities." Petition at 5. DIBC is only interested in the safe and efficient flow of traffic over the Ambassador Bridge and through the customs facility; the problem is Commodities' location, not its existence.

- A "key feature" of the MOA is that "Commodities will cease to exist." Petition at 7-8. The MOA makes no reference to Commodities, or to the numerous other properties and businesses that have been or will be condemned in the course of the Federal project.

- "The meeting . . . and the negotiations leading up to the signing of the MOA . . . were all secret." Petition at 7. As DIBC

and the United States have repeatedly stated, before both the district court and the court of appeals, that allegation is simply untrue.

- Petitioners imply that DIBC was involved in the rejection of Commodities' alternative plans for the expansion of the Federal facility. See Petition at 8. The rejection of Commodities' proposals was solely the decision of the General Services Administration, which addressed those proposals -- and all other public comments -- in the Environmental Assessment performed for the Federal project. Moreover, the fact that petitioners submitted such plans belies their claimed lack of knowledge and lack of an opportunity to provide input into the planned expansion of the Federal project.

- "[T]he First Sixth Circuit mandate (A15-A34) gave petitioners the right to challenge the MOA on the grounds of necessity and expediency." Petition at 11. As the court of appeals clearly stated, "[c]ontrary to intervenors' assertions, the [prior] panel did not decide anything related to the merits of their cause, and their entitlement to intervention was the only 'law of the case' at that point." (A3) (emphasis added)

- The United States Government "reneged on its agreement not to condemn Commodities." Petition at 13. The text of the letter upon which this allegation is based, quoted at pages 12-13 of the Petition, itself belies this claim. The United States never agreed (or promised) any such thing. Moreover, as the district court pointed out, even if such assurances had been given, the government is entitled to change the boundaries of the land to be condemned. (A50 at n.8)

- "There has been no mediation or extension" of the MOA. Petition at 17. This claim -- made ad nauseum by petitioners in the courts below -- deliberately fails to acknowledge that the government and DIBC continue to work together, by mutual consent, to implement the MOA.

Indeed, petitioners' whole speculative claim -- that the United States and DIBC are engaged in a conspiracy to put Commodities out of business -- has never been supported by a single demonstrated fact. As the district court stated, after petitioners were allowed to intervene and present their case,

> to the extent that Commodities and Lubienski persist in their argument that

> the stated public purpose of the bridge project is a sham and a coverup for the purpose of putting Commodities out of business (to benefit its duty-free shop competitor, Ammex, Inc.), Commodities has come forward with no hard evidence to substantiate its wholly speculative allegations.

(A56 at n.10 (emphasis added).)

Even without any such evidence, petitioners have already succeeded in delaying the completion of an important Federal project by exercising their right to intervene, to be heard, and to appeal the denial of a preliminary injunction. The Sixth Circuit affirmed the district court's decision in a per curiam opinion, and denied petitioners' request for rehearing or rehearing en banc. Petitioners have raised no significant issues in their Petition, and there is no reason to occupy this Court further with this matter.

CONCLUSION

For the reasons stated above, respondents respectfully submit that petitioners' Petition for a Writ of Certiorari should be summarily denied.

Respectfully submitted,

James F. Hibey
Verner, Liipfert, Bernhard,
McPherson & Hand
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005

Counsel of Record for
Respondent Detroit
International Bridge Company